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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-73

THE KANSAS CITY STAR COMPANY, FLAMBEAU PAPER COMPANY DIVISION,
Petitioner,

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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THE KANSAS CITY STAR COMPANY, FLAMBEAU PAPER COMPANY DIVISION,

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vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and WILLIAM A. ABEL, GEORGE J. BABLICK, KENNETH L. BALCZEWSKI, FRANK T. BAROKA, JAMES A. BAROKA, MELVIN K. BEHREANDT, DONALD N. BLACK, ORVIL G. BLACK, EUGENE L. BOLAND, CHARLES M. BOLZ, CALLIS H. BORNE, EARL E. BOROWSKI, DENNIS D. BOURGARD, LESTER R. BOURGARD, ROBERT J. BRADLE, ANTON D. BRAUNREITER, JOSEPH A. BRIMSTEIN, DOLORES H. BRUNS, JAMES E. BURBEY, MILES T. CHRISTIANSON, GARY A. COOLEY, RICHARD C. COOLEY, ARTHUR C. DANE, WALTER W. DILLON, ERVIN H. ENGEL, LARRY R. ERICKSON, DARRELL G. FALSTAD, VERNON L. FALSTAD, JAMES J. FENZL, LAWRENCE P. FENZL, A. H. FLEISCHFRESSER, DONALD E. FRANKE, LOUIS A. FRANKE, RAYMOND J. FRANKIEWICZ, WILLIAM G. GIERMAN, EDWARD L. GRUBER, LEONARD W. GRUBER, CHARLES A. GUSTAFSON, PATRICIA A. HAMMOND, EDWARD R. HANSON, ROBERT A. HANSON, ROBERT K. HEIN, TOM E. HEISLER, ALFRED E. HERBST, ARTHUR J. HERBST, CLARENCE E. HERBST, DELMAR J. HERBST, DONALD A. HERBST, JAMES E. HERBST, ROBERT K. HERBST, STEPHEN A. HERBST, BERNARD J. HILGART, EDWIN S. HILGART, ELMER C. HILGART, MICHAEL R. HILGART, LAWRENCE J. HILGART, PATRICK J. HILGART. RICHARD T. HILGART. RONALD W. HILGART, THOMAS W. HILGART, VERNON L. HILGART, FRANK J. HIRTREITER, FREDERICK HIRTREITER, CARLIN J. HOFFMAN, WILLIAM J. HOFFMAN, DURWOOD L. HOGUE, RONALD D. HOGUE, TRAVIS R. HOSEY, JAMES R. HOTH, MICHAEL J. HUGHES, CHARLES A. JAGLINSKI, NICHOLAS C. JAROSINSKI, LAWRENCE J. JOHNSON, HAROLD E. JOHNSTON, KENNETH G. KEILY, SYLVIUS G. KELNHOFER, JOHN M. KINNEAR, WARREN A. KIRSTEN, GARY L. KNOTTS, OTTO L. KOENIG, LOUIS F. KOLLER, JAMES L. KOSHAK, BERNIE F. KOTKE, GEORGE L. KOZAK, JR., JAMES A. KRONBERGER, RAY-

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Wisconsin dated October 30, 1973.

REFERENCE TO THE OPINIONS BELOW

The following court opinions and judgments, some of which have been reported, have issued in this case:

1. The unreported Judgment and Memorandum of Decision of the Circuit Court of Dane County, Wisconsin, were entered September 25, 1972 and are printed in the Appendix beginning at p. A21;

2. The opinion and judgment of the Supreme Court of Wisconsin is reported at 60 Wis.2d 591, 211 N.W.2d 488 (October 30, 1973) and is printed in the Appendix beginning at p. A50;

3. The unreported decision of the Wisconsin Supreme Court granting Petitioner's motion for rehearing was entered January 18, 1974 and is printed in the Appendix beginning at p. A64; and

4. The opinion and judgment of the Wisconsin Supreme Court "denying rehearing" is reported at ..... Wis.2d ....., 217 N.W.2d 666 (May 8, 1974) and is printed in the Appendix beginning at p. A65.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on October 30, 1973. After Petitioner's motion for rehearing was granted on January 18, 1974, the Supreme

Court of Wisconsin entered an order "denying the motion for rehearing" on May 8, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1257(3) and 2101(c).

QUESTION PRESENTED FOR REVIEW

Does Wisconsin's economic support of union members who are unemployed because of a labor dispute over their terms and conditions of employment violate and frustrate the federally mandated process of free and voluntary collective bargaining which requires that union and employer must rely only on their respective resources when engaging in lawful economic warfare?

CONSTITUTIONAL PROVISION INVOLVED

Article VI, Paragraph 2:

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

STATUTES INVOLVED

The pertinent provisions of:

1. Wisconsin Unemployment Reserves and Compensation Act, as amended, Chapter 108, Wis.R.Stats. (App. pp. A72-A87); particularly §108.04(10), which provides:

"Labor dispute. An employee who has left (or partially or totally lost) his employment with an employing unit because of a strike or other bona fide labor dispute shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

2. The National Labor Relations Act, as amended, 29 U.S.C.A. §141, et seq. (App. pp. A87-A91).

STATEMENT OF THE CASE

Pursuant to Section 1[1] of the then existing labor contract between Petitioner[2] and the Unions,[3] the Unions notified Petitioner on May 10, 1971[4] of their desire to "open our present labor agreement with your company to negotiate changes, wages and other monetary items and working conditions". Thereafter, there were many bargaining sessions between the parties. During these negotiating meetings, the positions of Petitioner and the Unions hardened with respect to the Unions' enormous economic demands and with respect to Petitioner's proposals for crucial modifications of contractual work rules. Finally, on July 25, the Unions' members voted 210 to 4 reject Petitioner's final

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1. See App. pp. A24-A25.

2. Petitioner is The Kansas City Star Company, Flambeau Paper Company Division.

3. Local 119, Pulp Sulphite and Paper Mill Workers and Local 445, Paper Makers and Paper Workers Unions will be referred to as the "Unions". The Unions negotiate jointly with Petitioner. "Individual Respondents" are claimants for unemployment compensation who were employees in the units represented by the Unions.

4. All dates are in 1971 unless otherwise designated.

contract proposal and between July 26 and July 28 the membership voted 219 to 19 to strike Petitioner.

On August 5 the Unions presented contract termination notices to Petitioner, pursuant to Section 1 of the labor contract. At this time Petitioner and the Unions were at an impasse in their intense and ongoing labor dispute over the terms and conditions of a new labor agreement. Thirty days after service of the termination notices, the Unions would be free to strike.

Aware of the time necessary to "wind down" a paper mill before it can cease operations without damage to materials or supplies, Petitioner decided to meet the Unions' strike threat directly by preparing the mill for a temporary shutdown and by advising its customers and suppliers that Petitioner would cease business temporarily because of the labor dispute. Following this strategy, Petitioner reasoned, would enable it to avoid conceding its bargaining goals while blunting the Unions' most devastating weapon: a strike for which Petitioner was not prepared. Thus, on August 6 and 7 Petitioner suspended its orders for supplies and on August 10 Petitioner notified its customers that it was curtailing the acceptance of orders. In addition, Petitioner began the long process of preparing the mill machinery for the temporary cessation of production.

It was in these circumstances that on August 19, after Petitioner had embargoed incoming supplies, turned its customers over to its competitors, and commenced the sequential shutdown of operations that the Unions sought to withdraw their contract termination notices "unless or until a new termination is sent or full agreement reached on a new contract." Faced with the imposition of wage controls on August 15, 1971, the Unions, on August 19, 1971, wanted to suddenly reverse their bargaining strategy and

withdraw the termination notices—probably to wait to resume bargaining if and when the wage freeze would end.

Petitioner advised the Unions that, under the contract, the Unions could not unilaterally withdraw the contract termination notices. But Petitioner counterproposed that it would accept the Unions' offer of withdrawal if the termination notices would not be reinstated within a fixed time. At the same time Petitioner made two new alternative proposals for a contract settlement.

The Unions rejected Petitioner's counterproposals both with respect to the matter of the contract termination notices and with respect to the new contract proposals. Because of the disputes between it and the Unions concerning the terms of a new labor contract and the Unions' proposed withdrawal of the termination notices, Petitioner continued its preparation for shutdown. As a result of Petitioner's shutdown of its mill due to the labor dispute, its employees temporarily lost their employment. The employees claimed unemployment compensation, but the Department's[5] Deputy charged with the initial investigation and determination of such claims, denied the unemployment compensation claim.

Subsequently, the Individual Respondents appealed the Deputy's decision to the Department. The Department reversed the Deputy's award and granted unemployment compensation to the Individual Respondents. The Department's award was, in turn, reversed on Petitioner's appeal to the Circuit Court of Dane County. The Circuit Court held that the Individual Respondents were not entitled to unemployment compensation. On both Individual Re-

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5. "Department" is the Respondent Wisconsin Department of Industry, Labor and Human Relations; a Commission within the Department is the state agency invested with power to make the final determination of unemployment compensation claims.

spondent's and the Department's appeal, the Supreme Court of Wisconsin reversed the Circuit Court and awarded the benefits to Individual Respondents. The Wisconsin Supreme Court granted Petitioner's motion for rehearing but denied it any relief after argument on rehearing. As a result, union members engaged in a labor dispute over their terms and conditions of employment with Petitioner were paid unemployment compensation.

The federal question sought to be reviewed was raised in the courts below in the following manner, and by the following methods:

1. In Petitioner's complaint in the Circuit Court of Dane County, Wisconsin (App. pp. A91-A93);

2. In Petitioner's Brief in the Circuit Court of Dane County, Wisconsin (App. p. A93);

3. In the Brief of Amicus Curiae (Wisconsin Manufacturers' Association) in the Circuit Court of Dane County, Wisconsin (App. pp. A93-A96);

4. In Petitioner's principal Brief as Respondent in the Wisconsin Supreme Court (App. p. A97);

5. In the Brief of Amicus Curiae (Wisconsin Manufacturers' Association) in the Wisconsin Supreme Court (App. pp. A97-A101); and

6. In Petitioner's Brief in Support of Motion for Rehearing in the Wisconsin Supreme Court (App. p. A101).

Neither the Circuit Court nor the Supreme Court passed directly on the federal issues thus raised, although, in the dissenting opinion on rehearing in the Wisconsin Supreme Court, three Justices stated, in part:

"The Commission's ruling in this case violated this mandate of 'neutrality' [of the State in labor disputes] and, in effect, required the employer [Petitioner] to contribute financial support to this labor dispute. If such a change is to be made in the law, it is the duty and concern of the legislature." (App. p. A71).

ARGUMENTS ADVANCED IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

In the instant case the Wisconsin state agency and the Wisconsin courts have ordered the payment of unemployment compensation to employees who were temporarily unemployed due to a labor dispute over their terms and conditions of employment. Notwithstanding the increasing amount of recurring litigation over the issue of publicly financed economic aid to persons unemployed due to their involvement in labor disputes,[6] the Court has not decided this matter of utmost significance. On the last occasion on which the issue was before the Court, it indicated that it should resolve the

"challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolu-

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6. See, e.g., *Francis* v. *Davidson*, 340 F.Supp. 351 (D.Md.), aff'd per curiam, 409 U.S. 904 (1972); *Grinnell Corp.* v. *Hackett*, 475 F.2d 449 (1st Cir.), cert. den. 414 U.S. 858, 879 (1973); *Russo* v. *Kirby*, 453 F.2d 548 (2d Cir. 1971); *ITT Lamp Division* v. *Minter*, 435 F.2d 989 (1st Cir. 1970), cert. den. 402 U.S. 933, reh. den. 404 U.S. 874 (1971); *Lascaris* v. *Wyman*, 31 N.Y.2d 386, 82 LRRM 2634 (1973); *Dow Chemical Co.* v. *Taylor*, 57 F.R.D. 105 (E.D.Mich. 1972); and *Almacs, Inc.* v. *Hackett*, 312 F.Supp. 964 (D.R.I. 1970).

tion of the important questions these concrete disputes present." *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 85 LRRM 2913, 2918 (1974).

The instant case arises free of the obstacles of mootness or other procedural deficiencies. It squarely presents the important issue as to whether a State agency may apply the State's unemployment compensation laws in derogation of federal law favoring free collective bargaining by supporting one party in the bargaining. The Wisconsin Supreme Court's order effectively decided this federal question of substance not heretofore decided by this Court; the order is probably not in accord with either applicable decisions of this Court or the federal substantive labor law controlling under the Supremacy Clause of the Constitution. Thus, it is imperative that the Court review and decide the propriety of State economic aid to Unions during a labor dispute.

The payment of public economic aid, as desirable as that may be in other circumstances, to persons unemployed because of a labor dispute is in derogation of the policies and purposes of the National Labor Relations Act, as amended, as well as the substantive law which this Court has directed to be fashioned from the policy of the national labor laws. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 488 (1957). As has often been emphasized:

> "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiating their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. [citing cases]" *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, 295 (1959).

Not only has the "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by governmental power to regulate the substantive solution of their differences", but it has also recognized that:

> "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Labor Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 488-489 (1960).

Economic power is clearly an integral part—possibly undesirable but nevertheless fundamental—of the process of collective bargaining. The Labor Board is primarily responsible for defining the federal labor policy and even it is not allowed to aid or weaken the lawful economic strength of either party in a labor dispute:

> "if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms which the parties contract. As the parties own devices become more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S.Rep. No. 105, 8th Cong., 1st Sess. p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Labor Board* v. *Insurance Agents' International Union, supra*, 361 U.S. at 490.

The provisions of the Labor Act "do not give the [Labor] Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power" because "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage". *American Ship Building Co.* v. *Labor Board*, 380 U.S. 300, 309 and 317 (1965).

Based upon these clear and consistent interpretations of the Labor Board's power vis-a-vis the economic weapons of labor and management, there can be no question but that the controlling federal labor law is as follows:

1. "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962); and

2. The parties to collective bargaining are free to "rely ultimately on [their] . . . economic strength to try to secure what [they] cannot obtain through bargaining" subject to the understanding that parties to collective bargaining will not "always be secure and able to achieve agreement even when their economic position is weak." *H. K. Porter Co.* v. *Labor Board*, 397 U.S. 99, 109 (1970).

Thus, it is readily apparent that the federal labor law relies nearly exclusively on the principles of freedom of contract to determine what parties can do to persuade each other in collective bargaining. The parties to collective bargaining must, in the final analysis, rely exclusively on their ability to barter and, if necessary, their lawful power to compel agreement on specific issues.

When a State enters labor-management relations and adds its economic might to one side or the other, the federal policy of free and voluntary collective bargaining is defeated and handicapped. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967). In *Nash* the Court struck down an application of the Florida unemployment compensation statute which discouraged persons from filing unfair labor practice charges; in the instant case Wisconsin is using its unemployment compensation statute to undermine Petitioner's statutorily protected right in collective bargaining to employ its unfettered lawful economic strength against the Unions and Individual Respondents. Additionally, Wisconsin's application of its unemployment compensation laws unlawfully excuses the Unions and Individual Respondents from their obligations to participate in collective bargaining relying solely on their own economic fortitude, unaided by the resources of an outside interest. Thus, here, as in *Nash*, the application of the State unemployment compensation statute must be reversed because it is in derogation of fundamental precepts of federal labor law which are controlling under the Supremacy Clause:

> "For a State to impinge in the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purpose of or by methods which the federal Act prohibits." *Garner* v. *Teamsters Union*, 346 U.S. 485, 500 (1953).

The Court should undertake to balance the competing interests in this case: the State's social and economic interest in the provision of aid to the unemployed, on the one hand, and the federal labor laws' social and economic policy that employer and union, without outside interference, must construct their own collective bargaining relationship, on the other hand. Reconciliation of these

competing interests is necessary to insure that vital public funds are not dislocated to causes or persons in a manner inconsistent with the purpose of the funds or laws underlying labor-management relationships in our society.

CONCLUSION

For the foregoing reasons Petitioner respectfully urges that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

BEFORE THE DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

In the matter of the unemployment benefit claims of LAWRENCE H. DRAXLER, and others, Employes, Appellants (List Attached)

Hearing Numbers 86817 thru 86821, 86998 thru 87331, 87446 thru 87448

Involving the account of KANSAS CITY STAR COMPANY, Employer, Respondent, 200 First Avenue, Park Falls, Wisconsin 54552

INDUSTRY, LABOR AND HUMAN RELATIONS COMMISSION DECISION

The employer alleged that the employes were ineligible for unemployment benefits starting with week 36 of 1971, on the ground that they left or lost their employment because of a strike or other bona fide labor dispute in active progress in the establishment in which they were employed. The commission deputy's initial determinations issued in each case suspended benefits starting with week 32 of 1971 or a later week on the ground alleged. The employes appealed.

While the matter was pending, the Industry, Labor and Human Relations Commission, pursuant to authority granted in section 108.09(6)(a) of the statutes, transferred the proceedings to itself by an order dated October 18, 1971.

Hearing was held at Park Falls on October 25, 1971, before Max J. Peltin, examiner, acting as deputy for the Industry, Labor and Human Relations Commission.

APPEARANCES: The employes appeared by Goldberg, Previant & Uelmen, attorneys, by Albert Goldberg.

The employer appeared by Watson, Ess, Marshall & Enggas, attorneys, by Allan L. Bioff.

Based on the applicable records and evidence in this case, the Industry, Labor and Human Relations Commission makes the following

FINDINGS OF FACT

The employer is engaged in the manufacture and sale of fine paper, and has approximately 380 production workers who are represented by two unions. It has had joint collective bargaining agreements with the two unions for about thirty years, and the last such agreement was in effect from August 1, 1969, until July 31, 1971, and provided that it shall remain in effect from year to year thereafter unless terminated in accordance with an applicable provision of the agreement. This agreement provides:

> "Section 1 (b) If either party shall desire to change any provision of this agreement, it shall give written notice of such desire to the other party at least sixty (60) days in advance of any anniversary date.
>
> "(c) The giving of notice provided in subsection (b) above shall constitute an obligation upon both parties to negotiate in good faith all questions at issue, with the intent of reaching written agreement prior to the anniversary date.

"(d) If the parties have not reached agreement on or before the anniversary date, all the provisions of the agreement shall remain in effect unless specifically terminated in accordance with the provisions of Section 2, below."

Section 2 of the agreement provided:

"(a) At any time after the anniversary date, if no agreement on the questions at issue has been reached, either party may give written notice to the other party of intent to terminate the agreement in (not less than) thirty days. All the provisions of the agreement shall remain in full force and effect until the time set forth has elapsed. During this period, attempts to reach an agreement shall be continued.

"(b) If the parties have failed to resolve their differences before the time set forth has elapsed, all obligations under this agreement are automatically canceled."

The agreement further provided that the two unions are the sole bargaining agencies for all employes eligible for membership in their respective [illegible] the purpose of collective bargaining with respect to wages, hours, and working conditions; and that all employes covered by the agreement shall as a condition of employment become members of one of the unions after thirty days of employment or the effective date of the agreement or the signing of the agreement, whichever is later. Certain classes of employes were expressly excluded from membership in either of the unions. All of the employes involved in this case were members of one or the other of the two unions.

By letter, dated May 10, 1971, which was more than sixty days prior to the termination date of the agreement, both unions gave the employer notice that they desired to

open the present labor agreement and to negotiate changes, wages, and other monetary items and working conditions. After receiving this notice the employer communicated with the unions with regard to negotiating a new agreement and the first meeting between the employer and union representatives was held on June 11, 1971. At this meeting the union presented a list of its demands, including a wage increase of 10 percent with a minimum of 29 cents an hour during the first year of the contract and an increase of 32 cents an hour during the second year, and increases in various insurance coverages, increase in the third shift differentials to 20 cents from 14 cents, increases in vacation allowances and pension benefits. The employer at that time submitted a list of proposed changes in the work rules.

Meetings were held thereafter on July 1 and 2 at which the employer offered a 6 percent increase in wages without the requested minimum of 29 cents an hour the first year, and a 20 cents an hour increase in wages the second year of the contract, made counter proposals regarding vacation and pension allowances, agreed to the unions' request for an increase in life insurance from $4,000 to $6,000, agreed to increase the major medical insurance coverage from $5,000 to $10,000 but not to $20,000 as requested by the unions, and made counter proposals to the requested increase in the night shifts' wage differentials of one cent on each of the second and third shifts, or 15 cents on each shift. The unions did not accept any of the employer's counter proposals, but agreed (at that meeting or a later meeting) to lower its wage request during the first year of the contract from 10 percent to 9 percent. The unions did not agree to any of the most important work rule changes proposed by the employer and the employer made it clear to the unions that all of its mone-

tary proposals were dependent upon their accepting the employer's work rule proposals.

Another meeting between the company and the unions was held about two weeks later, on July 16, at which the employer did not agree to any higher wage increase than it had previously offered, did not agree to any higher night shift differential than it first proposed, but did agree to changes in some of the fringe benefits. The unions did not agree to any of the most important changes in the work rules proposed by the employer and indicated that they would not do so. The next meeting was held on July 23 and at that meeting the employer increased its wage proposal for the first year of the contract from 6 percent to 6½ percent and from 20 cents to 22 cents an hour during the second year of the contract. The unions informed the employer that its proposals were completely unsatisfactory, stated that there was no purpose in continuing the meeting, and the meeting was adjourned. No date for a further meeting was set at that time. Meanwhile, the unions notified the employer that on July 26 at a joint meeting of the union membership, the members of the unions had rejected the latest proposals of the employer by a vote of 210 to 4. The employer was also notified that on July 27 the unions had taken a strike vote and had voted 291 to 19 to strike.

A further meeting was held on August 5 at the request of a federal mediator. The employer did not increase the wage proposals it had previously made and again informed the unions that its monetary proposals depended upon the unions' acceptance of the work rule changes proposed by the employer. The unions did not agree to any changes in their requests and stated they would hold a caucus and requested the employer negotiator to be available for the results of the caucus. At 5:40 p.m. each of the unions handed the employer's negotiator (the assistant general manager) notices substantially as follows:

"Pursuant to provisions Section 2, Labor agreement between (employer) and the (union); we do hereby terminate the agreement.

"We will be glad to meet with you any time during the 30 day period to try and resolve our differences."

The following day, August 6, 1971, the employer mailed letters to each of the unions as follows:

"We are in receipt of your letter of August 5, notifying our Company that you have terminated the Labor Contract under the provisions of Section 2.

"As a result of this action on the part of the Union, all offers heretofore made by the Company in connection with our current labor negotiations is hereby withdrawn.

"During the thirty-day interim period, if it is your desire to meet with the Company Bargaining Committee, please contact (the assistant general manager and employer negotiator)."

On August 2, 1971, the employer notified its pulpwood suppliers of the threat of a strike in its plant and that unless an agreement was reached soon it would be necessary to discontinue receiving pulpwood. On August 6, the employer notified its pulpwood suppliers by letter and radio announcement that, due to an impending strike of its employes and the serving on it by the unions of notices of termination of the contract, it was discontinuing receiving pulpwood by railroad cars as of August 9, 1971, and by trucks as of 4 p.m. on August 10. It also sent letters to its suppliers of other materials to discontinue shipments of those materials. On August 10, it mailed in excess of 300 letters to its customers informing them that it was faced with a strike on September 5, that it was curtailing accep-

tance of orders to those that it could assure shipment before the shutdown, and that it could take no further orders for certain types of paper. The employer sent these letters to its customers so that they could arrange for other manufacturers to supply their needs. The employer did not accept any orders after August 10 for paper which it would have had to manufacture after that date, although it did accept orders that it could fill from inventory. By these actions the employer instituted a procedure by which it could cease operations in an orderly manner by the close of business on Friday, September 3, 1971 (in week 36).

On August 15, 1971, the President of the United States, by Executive Order No. 11615, ordered that prices, rents, wages, and salaries shall be stabilized for a period of 90 days effective as of the date of the order at levels not greater than the highest of those pertaining to a substantial volume of actual transactions during the 30-day period ending August 14, 1971, and that "no person shall, directly or indirectly, pay or agree to pay in any transaction wages and salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise."

On August 19, 1971, a meeting was held between the employer and the union at the request of a federal mediator. At that meeting each of the unions submitted substantially similar letters to the employer, as follows:

> "On August 5, 1971, we submitted a letter to you on behalf of (the local union) serving notice of contract termination.
>
> "In light of President Nixon's ninety day freeze on wages and prices, this letter will serve as a withdrawal of that termination notice and of our desire to continue to work under the terms of the existing

agreement, unless, or until, a new termination is sent or full agreement reached on a new contract."

The employer replied to the unions by a letter dated August 19, 1971, as follows:

"We are in receipt of your notice of August 18, wherein you wish to withdraw your notice of termination of Contract, dated August 5.

"We can find no provision in the present Labor Contract which would authorize the withdrawal of termination notice after once being tendered.

"We will accept the withdrawal notice, provided we have your guarantee in writing that it will not be reinstated prior to one year from the date of notice of withdrawal.

"The reason for the Company's position on this point, is that we have already begun winding down our operations, and we have turned down many orders in anticipation of an impending strike, and this places us in a very untenable position as far as our customers are concerned, and our ability to be a firm supplier of their needs. It is almost impossible for us to continue to insure the customer of our reliability if we are faced with a reinstatement of termination notice, at the whim of the Union.

"It is essential that we have this one year guarantee for our continued operation."

At the August 19 meeting the employer proposed extending the existing contract for one year as long as there would not be any chance of a strike during that year. The unions did not accept this proposal and asked if the employer had any other proposals. The employer then proposed a two-year agreement and submitted its proposed

two-year agreement, which did not provide for any wage adjustment because of the price-wage freeze. The unions rejected the employer's proposed agreement. The employer proceeded winding up its operations and its operations ceased at the end of the business day on September 3. About 24 employes were laid off on September 2, an additional 23 or 24 at the beginning of September 3, and the remaining employes were laid off at the end of September 3 (in week 36). Although the employer made a few shipments in September and October from inventory and from purchases it made to meet certain commitments, its operations after September 3 were insignificant and its plant operations for all practical purposes ceased at the end of Friday, September 3, 1971.

Further meetings were held in September and October without any agreement being reached.

Section 108.04(10) of the Wisconsin Statutes provides:

> "An employe who has left (or partially or totally lost) his employment with an employing unit because of a strike or other bona fide labor dispute shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

The Commission does not consider that the employes lost their employment with the employer because of a bona fide labor dispute within the intent and meaning of section 108.04(10).

The employes had the contract right to terminate their agreements upon 30-day notices pursuant to section 2. They gave the employer such notices. The employes also took a strike vote and gave approval to the union officers to call a strike after the contracts were terminated.

The employes' actions were in accordance with the contract provisions and appeared in good faith. At most the strike vote was an indication that a strike might occur.

In 1969 the unions served 30-day termination notices upon the employer as provided by section 2 of the contract. No strike occurred in 1969 because agreement was reached immediately prior to the end of the 30-day period by the unions and the employer. During this period the employer did not give any notices to suppliers and customers of the contract termination or attempt to in any way "wind down" its operations.

The employer knew on August 19, 1971, that the employes would not strike after the termination of the contract on September 3, because of the unions' letters withdrawing the termination notices and indicating a willingness to continue to work under the terms of the existing contracts until new terminations of the contracts were sent or new contracts consummated.

The employer refused to accept the unions' withdrawals of the contract terminations unless the unions agreed in writing that new contract terminations would not be reinstated for a one-year period.

The employer's contention that the termination notices were strike threats loses its persuasiveness in view of the employe's withdrawal of the termination notices. It appears that the good faith efforts by the unions to continue the contracts required the employer to accept the withdrawal notice even though the contract is silent as to the unions' right to withdraw the termination notices.

The employer's actions in laying off over 20 employes on September 2, and about the same number on September 3, were in direct violation of contract provisions that there would be no lockouts during the period of the agreements.

Accordingly, if these actions amounted to lockouts, these lockouts would not be bona fide labor disputes.

In view of the fact that the employer had assurance on August 18, 1971, that no strike would take place as previously threatened, the employer's actions in continuing to "wind down" its business operations and to lay off all of its production employes on September 2 and 3 were not required, necessary or warranted business decisions on the part of the employer.

Since the employer terminated the employment of the employes solely because of economic worries over the preservation of its relations with its suppliers and its customers, this was a business judgment and did not constitute a "bona fide labor dispute" as contemplated by section 108.04(10). Accordingly, the employes lost their employment as a result of the employer's actions in shutting down the plant. This action in effect was a layoff which was not as a result of a bona fide labor dispute. See *Barrett* v. *Wasson Coal Co.* (1949), 404 Ill. 11, 87 N.E.2d 769.

The Commission therefore finds that each of the employes lost his employment with the employer in week 36 of 1971 but that such employment was not lost because of a bona fide labor dispute in active progress in the establishment in which he is or was employed, within the meaning of section 108.04(10) of the Wisconsin Statutes.

DECISION

The initial determination of the deputy is reversed. Benefits are allowed to each of the employes if he is otherwise eligible.

Dated and mailed January 4, 1972.

Industry, Labor and Human Relations Commission
/s/ Philip E. Lerman
/s/ John C. Zinos

DISSENT

/s/ Joseph R. Kautzer

It is clear from the evidence that there was a labor dispute in existence, within the meaning of section 108.04 (10) of the statutes, inasmuch as there was a controversy between the employer and its employes regarding the details of collective bargaining. It is further apparent that these employes lost their employment with the employer in week 36 of 1971 because of such labor dispute.

Such dispute had its inception in the 60-day notice served on the employer by the employes in May of 1971 stating that they desired to renegotiate certain provisions contained in the existing agreement. In conformance therewith, numerous meetings were held at which proposals and counter proposals were made by each party. Although no agreement was reached prior to the expiration of the existing labor agreement on July 31, 1971, negotiations continued thereafter.

At the meeting of August 5, 1971, the employer and the unions were still unable to reach agreement as to the terms and conditions of a new contract. When the unions that same day gave the employer 30-days' notice of termination of the agreement, together with the fact that the employer

had previously been informed that the membership of the unions had taken a strike vote and had voted to strike by a large majority, the employer reasonably concluded that a strike would occur at the end of the 30-day period. The employer then proceeded to take steps to wind down its operations at the end of that period including notifying its suppliers that it would not accept deliveries after August 9 and 10 and notifying its customers that it would not accept further orders.

Although the unions purported to withdraw their 30-day notices of termination of the contract after President Nixon issued the Executive Order freezing wages and prices for a 90-day period, the employer was not obligated to accept those withdrawals unconditionally. Because of business considerations, including its reputation as a reliable source of its paper products, the employer considered that it could not accept the unions' withdrawal of their notices of termination of the contract without an agreement by the unions not to institute the same procedures at the conclusion of the 90-day wage-price freeze. Without such agreement by the unions the employer would have had to reverse the procedure it had instituted with its customers and suppliers and then be faced with the same situation at the expiration of the period of wage-price freeze and would again have to notify its suppliers to discontinue shipments and to notify its customers that it would be unable to make deliveries and would not accept orders for its products. Under the circumstances, the employer's actions cannot be considered to have been unreasonable.

The employes did not go out on strike and were willing to continue to work after September 3, 1971. Their unemployment thereafter was due to employer action and constituted a lockout. The Wisconsin Supreme Court in

A. J. Sweet of LaCrosse, Inc., et al. v. *Ind. Com., et al.*, (1962), 16 Wis. (2d) 98, held:

> "The statutory words 'other bona fide labor dispute' are broad enough to embrace those which culminate in lockouts. The commission has consistently, over a period of at least the past twenty-three years, interpreted this statute as disqualifying from benefits those employees who have lost time from work due to a lockout precipitated by a bona fide labor dispute."

Although the labor agreement provided that "The Company agrees that there will be no lockouts during the period of this Agreement," this agreement had been terminated by the unions' notification of such termination and acceptance of that termination by the employer, and pursuant to section 2 (b) of the contract, supra, all obligations under the agreement were canceled at the expiration of the 30 days on or prior to September 3, 1971, in accordance with the notice of termination submitted by the unions. After such notice of termination and acceptance thereof by the employer, the agreement could only be reinstated by mutual consent of both parties or by the making of a new contract, which did not occur.

The Executive Order of the President did not specifically refer to strikes or lockouts, but requests were made by the President's administration that current strikes be halted and that no new ones be started during the 90 day stabilization period. However, since the Executive Order did not prohibit strikes or lockouts during the 90-day period, the employer's action in discontinuing operations and locking out its employes was not in contravention of the Executive Order and was not illegal.

Under the circumstances, there was a labor dispute between the employer and the employes. Such dispute or

controversy arose out of the unions' demands for contract changes and precipitated the shutdown. Such shutdown was a development in the labor dispute, and the causal connection between such dispute and the unemployment of the employes in clearly apparent.

The employer acting in good faith in its negotiations with the employes and, in view of the impasse in the negotiations, the employer's refusal to accept the unions' withdrawal of their notices of contract termination did not constitute a lack of good faith as its action in that regard was motivated by business factors since it considered that it could not continue to operate as a reliable supplier of its products without a new contract or an agreement that the unions would not serve an additional 30-day notice of contract termination for a period of one year.

Accordingly, it is abundantly clear from the evidence that the employes lost their employment with the employer starting with week 36 of 1971 because of a bona fide labor dispute in active progress in the establishment in which they were or are employed, within the meaning of section 108.04(10), stats.

In my opinion the deputy's initial determination suspending the employes' benefit eligibility as of week 36 of 1971 should be affirmed.

KANSAS CITY STAR COMPANY—Labor Dispute
Local 119

Balzer, Joe J.	475-01-7927	Hardginski, George F.	390-16-2396
Barker, Robert B.	322-05-0520	Helberg, William R.	399-40-0074
Behreandt, Kenneth E.	395-36-5739	Herbst, Forest E.	394-18-2115
Bichanich, Mike	398-10-1280	Herbst, Leonard W.	393-03-4499
Billing, Lawrence J.	396-40-8931	Hilgart, Fred W.	388-38-6917
Bluedorn, Otto C.	392-18-5325	Hilgart, John M., Jr.	388-28-0530
Bourgard, Gerald F.	393-38-6813	Hilgart, Robert C.	389-36-3701
Bourgard, Lavern L.	394-10-5935	Hilgart, William A.	393-03-4078
Boushon, Clifford E.	399-12-6659	Hodun, Edward	350-24-1013
Bradle, Clarence L.	397-03-0830	Hoefferle, Ronald J.	396-48-1888
Brandt, Robert T.	398-24-5048	Hoefferle, Rudolph J.	389-38-8167
Buechner, Walter B.	392-28-4891	Hoth, Quentin, J.	389-18-9454
Burhans, Gerald R.	394-18-0747	Hughes, Patrick D.	393-03-4358
Carlson, Arthur W.	394-09-8231	Jemiola, Raymond W.	320-05-4382
Christian, Harold J.	392-24-8629	Karl, John H.	394-26-4926
Christianson, Guy M.	393-03-4234	Keily, Allan F.	393-10-9942
Darrow, Roy A.	390-20-3088	Kinnear, David W.	522-54-2595
Draxler, Lawrence H.	395-14-3085	Kolar, William J.	393-09-6665
Engel, Donald A.	397-32-5003	Kolonko, Joseph J.	398-10-0400
Ernst, Max A.	393-07-6671	Kotke, Charles C.	359-03-6979
Fischer, Joe B.	395-03-4406	Kotke, Gotlieb, F.	393-03-4289
Fleming, Roger L.	392-30-5317	Kronberger, Peter G.	393-42-1239
Fuhrman, Charles L.	394-30-0289	Kundinger, Clarence J.	394-09-0963
Furtak, Frank J.	396-14-0238	Kundinger, Elmer E.	395-07-6375
Franke, Earl	395-07-8436	Klein, Delmar H.	394-34-5918
Fredrick, EArl W.	396-16-3494	Langner, Bernard C.	394-12-0262
Gavin, James R.	390-42-3731	Lavoie, Robert D.	396-16-2601
Gelina, Alfred A.	394-14-1176	Leitl, Donald G.	391-36-1256
Glaeser, Richard A.	723-01-3021	LeValley, James	358-28-8429
Glaeser, Robert Q.	387-34-0599	Liebelt, Donald E.	396-38-9101
Goethlich, Kenneth L.	398-24-5046	Little, William J.	387-54-9975
Gotz, Martin A.	395-01-0547	Loula, Arnold L.	398-36-3350
Griffin, Edmond H.	721-09-3524	Luhtala, John O.	393-36-9652
Gruber, Edward G.	393-03-4481	Mader, Charles W.	393-10-8021
Gruber, Robert J.	398-24-5247	Martin, George R.	395-34-9622
Hamann, Robert J.	388-38-5065	McCardell, Keith F.	550-26-8030
Hammond, Kenneth	393-03-4353	McKeun, Michael P.	392-50-8100
Hanish, Merton C.	389-22-3166	Merten, William C.	394-34-7353
Hanns, Lawrence A.	389-05-5784	Messerschmidt, David R.	389-40-3356

KANSAS CITY STAR COMPANY—Labor Dispute
Local 119

Meyer, Charles A.	398-24-5047	Steiner, Jerald A.	387-52-8984
Michalski, Andrew A.	394-09-1532	Striegel, George L., Jr.	389-22-0729
Michalski, Robert J.	394-09-2570	Stueber, Roman F.	395-28-8510
Michalski, Thomas A.	396-38-9827	Svehla, Vaclav J.	394-18-1557
Miller, Edward J.	395-32-8692	Szymik, Victor	393-03-4348
Mockler, Thomas E.	399-46-7269	Taft, Erwin F.	393-26-0513
Morgan, Dennis E.	396-40-9226	Van Den Heuvel, Bernard	398-36-4920
Morgan, Tom R.	391-54-2936	Wagner, Frank R.	396-28-9308
Moore, John J.	387018-2752	Wallner, Raymond F.	470-26-2112
Mrotek, Dale F.	387-34-2400	Wallner, Sylvester W.	398-18-1671
Myers, Alfred H.	393-03-4045	Wardensky, Oscar W.	393-03-3948
Nordall, Robert W.	393-03-3904	Warren, Harold W.	390-24-0179
Oswald, Fred J.	399-34-4491	Wartgow, William	389-28-5977
Palecek, John A.	397-38-7292	Wasko, Walter, Jr.	728-14-0601
Palecek, John J., Jr.	393-03-3937	Wehrman, Norman L.	398-18-3199
Palecek, Lloyd C.	395-09-6530	Weik, Dennis C.	390-42-5384
Palecek, William J.	394-34-5320	Weik, William D.	392-52-7431
Peterson, Raymond P.	399-30-8658	Weinberger, Henry	372-12-5686
Pohle, Alfred J.	393-03-4108	Weinberger, Ronald W.	396-50-3327
Pritzl, Kenneth F.	388-30-7236	Weinberger, William J.	391-18-8438
Radlinger, Ronald M.	388-48-6823	Weis, Joseph A.	395-26-9876
Rathsack, James J.	393-30-8390	Westphal, Edward W.	399-03-3073
Reas, Douglas R.	397-38-6443	Whiting, Daniel H.	392-40-2049
Richter, Howard A.	396-38-7537	Woodie, Raymond J.	393-40-7027
Rissue, Harold F.	389-18-1072	Woodie, Robert J.	398-24-4531
Roberts, Richard D.	390-32-8966	Yunk, Ernest F.	390-14-9265
Rose, David D.	394-44-2851	Yunk, James W.	388-28-1499
Schmidt, Arthur R.	388-30-3523	Zierer, James A.	389-34-5952
Schneider, Eugene A.	392-50-9772	Zoesch, David W.	387-42-3851
Schondelmaier, Harry W.	393-03-4252	Zoesch, Eugene R.	392-22-8493
Schrader, Oscar H.	394-14-1110	Zoesch, William A.	399-42-8176
Sedovic, Paul	393-20-8567		
Setterman, Jerry A.	392-44-1832	Rebne, Gunnar R.	397-38-7432
Setterman, Lawrence R.	393-36-5510	Hearing No. 87448	
Singer, Lawrence M.	395-14-3546		
Slack, Floyd M.	393-03-4734		
Slack, Kenneth J.	395-01-2738		
Slack, Russell G.	389-26-8219		
Spranger, Herman A.	393-07-6647		

KANSAS CITY STAR COMPANY—Labor Dispute
Local 445

Abel, William A.	399-34-1857	Hanson, Edward R.	392-50-8669
Bablick, George J.	388-52-0483	Hanson, Robert A.	390-16-2042
Balczewski, Kenneth L.	389-32-2788	Hein, Robert K.	392-44-0735
Baroka, Frank T.	393-42-1383	Heisler, Tom E.	388-46-9390
Baroka, James A.	399-52-4491	Herbst, Alfred E.	393-09-6710
Behreandt, Melvin K.	393-03-4785	Herbst, Arthur J.	394-20-2779
Black, Donald N.	394-16-1875	Herbst, Clarence E.	393-03-4007
Black, Orvil G.	394-10-6190	Herbst, Delmar J.	393-28-1797
Boland, Eugene L.	475-46-7175	Herbst, Donald A.	389-34-5492
Bolz, Charles M.	390-32-7541	Herbst, James E.	390-42-6455
Borne, Callis H.	395-34-7451	Herbst, Robert K.	393-36-5423
Borowski, Earl E.	388-16-4861	Herbst, Stephen A.	392-30-5834
Bourgard, Dennis D.	399-52-4964	Hilgart, Bernard J.	393-36-5140
Bourgard, Lester R.	393-03-4130	Hilgart, Edwin S.	399-46-6248
Bradle, Robert J.	387-52-9020	Hilgart, Elmer C.	395-10-9908
Braunreiter, Anton D.	395-32-2016	Hilgart, Michael R.	393-32-7551
Brimstein, Joseph A.	390-18-3940	Hilgart, Lawrence J.	389-34-6918
Bruns, Dolores H.	390-14-9142	Hilgart, Patrick J.	398-07-6897
Burbey, James E.	394-05-1552	Hilgart, Richard T.	396-48-1496
Christianson, Miles T.	389-34-6150	Hilgart, Ronald W.	399-34-1295
Cooley, Gary A.	399-40-0954	Hilgart, Thomas W.	390-42-6723
Cooley, Richard C.	389-42-3312	Hilgart, Vernon L.	393-38-6772
Dane, Arthur C.	398-18-0112	Hirtreiter, Frank J.	388-36-3517
Dillon, Walter W.	393-03-4150	Hirtreiter, Frederick	394-44-3264
Engel, Ervin H.	392-28-3264	Hoffman, Carlin J.	389-38-1003
Erickson, Larry R.	396-38-8492	Hoffman, William J.	393-03-4362
Falstad, Darrell G.	399-40-0315	Hogue, Durwood L.	397-10-1220
Falstad, Vernon L.	388-28-0532	Hogue, Ronald D.	389-38-8353
Fenzl, James J.	395-36-5381	Hosey, Travis R.	387-44-5384
Fenzl, Lawrence P.	397-32-5656	Hoth, James R.	396-48-1622
Fleischfresser, A. H.	398-07-9651	Hughes, Michael J.	392-44-1028
Franke, Donald E.	387-50-8950	Jaglinski, Charles A.	390-16-1370
Franke, Louis A.	398-01-0127	Jarosinski, Nicholas C.	303-50-1095
Frankiewicz, Raymond J.	342-30-0807	Johnson, Lawrence J.	395-28-9111
Gierman, William G.	396-48-1613	Johnston, Harold E.	399-12-7742
Gruber, Edward L.	397-32-5914	Keily, Kenneth G.	390-40-4191
Gruber, Leonard W.	394-05-1475	Kelnhofer, Sylvius G.	395-01-0501
Gustafson, Charles A.	398-36-4818	Kinnear, John M.	399-40-3729
Hammond, Patricia A.	470-30-6726	Kirsten, Warren A.	387-34-9942

KANSAS CITY STAR COMPANY—Labor Dispute
Local 445

Knotts, Gary L.	308-28-8911	Oswald, Frank J.	367-14-9189
Koenig, Otto L.	394-14-2557	Packard, Dale L.	395-10-2409
Koller, Louis F.	393-03-4541	Palacheck, Vernon E.	389-22-3204
Koshak, James L.	389-34-6081	Palecek, Frank C.	393-10-7942
Kotke, Bernie F.	387-44-5598	Palecek, Gust L.	399-12-7638
Kozak, George L., Jr.	396-50-4621	Passer, Monte J.	397-32-7099
Kronberger, James A.	388-38-7223	Peterson, Edward H.	387-24-6556
Kronberger, Raymond J.	393-34-0342	Peterson, Larry J.	389-38-6189
Kronberger, Theodore L.	391-36-0359	Peterson, Reginald E.	395-01-0142
Kronberger, Thomas J.	399-34-0930	Podrez, Leon E.	470-28-2388
Kronberger, William F.	398-26-9982	Pohle, Thomas J.	387-50-8697
Kundinger, Bernice Y.	389-34-7297	Preissner, Richard F.	356-14-6402
Kundinger, Eugene A.	392-24-8376	Pritzl, Isabel	388-18-2765
Kundinger, James A.	392-30-5673	Pritzl, James J.	394-26-3647
Kuse, Caroline D.	393-03-4090	Radlinger, Alvan W., Jr.	396-50-3598
Lamere, Anna M.	393-42-7875	Radlinger, John J.	389-36-4611
Lannigan, Gene E.	389-22-0647	Radlinger, Joseph G.	398-01-3940
Lapp, Frank J.	393-10-7940	Radlinger, Mike R.	386-03-6773
Lenzen, Frederick M.	393-34-9783	Reas, Emeron O.	393-03-4113
Little, Richard J.	393-36-5640	Rominske, Raymond R.	388-16-4908
Lizak, Edware J.	387-54-7529	Rose, Paul A., Jr.	394-38-9105
Lucas, William J.	396-16-0175	Scherwinski, Glen D.	394-44-4717
Mader, Thomas L.	399-40-1475	Scherwinski, Howard E.	391-36-2314
Martin, Elmer J.	399-34-1435	Scherwinski, Jerome E.	396-36-4582
Mc Corison, Byron F.	388-28-7056	Schmidt, Henry P.	393-03-3907
McCue, John H.	395-48-4075	Schmidt, Richard J.	389-18-2946
Meyer, Ronald G.	399-32-4984	Schneider, George W.	387-50-9160
Michalski, Arnold M.	389-36-4687	Schoch, Ronald J.	396-36-4944
Michalski, George F.	397-42-7570	Schultz, Herbert H., Jr.	396-28-9795
Morgan, Glenn L.	389-22-1668	Schultz, Robert L.	396-12-9044
Morgan, Herbert D.	398-24-4264	Seidl, Joseph A.	394-09-2569
Murphy, Donald E.	389-30-5218	Severt, John D.	389-36-4667
Nessman, Erland V.	395-03-0387	Skawinski, Raymond M.	359-03-0318
Niebauer, Joseph R.	393-03-3906	Slack, Gerald R.	399-48-6738
Niebauer, Ronald W.	396-40-9620	Slack, William F., Sr.	399-46-6255
Northrop, Richard W.	388-38-5031	Smetak, James W.	398-24-4362
Obernberger, Theodore J.	389-22-1426	Smith, Thomas A.	388-38-7436
Olson, Clayton R.	399-12-8904	Steiner, Verna I.	393-12-4589
Olson, Richard C.	501-30-0313	Stull, Harlan J.	327-20-9884

KANSAS CITY STAR COMPANY—Labor Dispute
Local 445

Sturm, Hershal H.	393-36-6762	Weiberg, Erwin M.	396-50-2940
Sutherland, Robert E.	394-14-1042	Weimer, Donald L.	387-34-0898
Szymik, Jerome P.	387-50-7678	Weinberger, Jerald F.	388-52-0258
Szymik, Roger M.	389-44-0336	Weiss, Joseph C.	393-32-9337
Thibedeau, James A.	399-30-8291	Wendland, Jerome L.	388-32-6991
Thibedeau, Neil W.	391-34-9752	Wirsing, Jonathan R.	387-50-8133
Thier, Anthony C.	392-52-5583	Wolf, Grant J.	393-10-9905
Thier, Jerome A.	393-36-9891	Wolfe, James A.	399-40-4655
Thoms, George W.	392-24-7629	Wolfe, William G.	388-38-5522
Toney, Elaine J.	394-10-5949	Woodie, Richard W.	397-07-8000
Treml, David A.	397-42-8828	Woodie, William E., Jr.	398-18-1089
Treml, George A.	387-12-6272	Yunk, Edward W.	390-18-3985
Treml, Lawrence A.	388-38-7045	Yunk, Richard A.	391-36-1357
Vuchetich, Michael A.	398-07-0570	Zoesch, John C.	388-52-0021
Walker, Gene D.	392-30-6236		
Walker, Gordon D.	395-34-7644	Schrader, Edward F.	396-38-9023
Walker, James D.	395-48-2969	Hearing No. 87446	
Wartgow, Herman R.	390-20-4569		
Watland, Clarence L.	502-01-3468	Sheedy, Clarence J.	396-12-8204
Wegner, Dennis W.	397-48-8907	Hearing No. 87447	
Wegner, Robert W.	393-18-0529		

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 135-297

THE KANSAS CITY STAR COMPANY,
FLAMBEAU PAPER CO. DIVISION,
Plaintiff,

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, WILLIAM A. ABEL, et al.,
Defendants.

JUDGMENT

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above review action having come on for hearing before the Court, George R. Currie, Reserve Circuit Judge, presiding, on the 8th day of September, 1972, at the City-County Building in the City of Madison; and the plaintiff having appeared by Attorney Allan L. Bioff of the law firm of Watson, Ess, Marshall & Enggas of Kansas City, Missouri, and by Attorney Carroll E. Mitzner of the law firm of Aberg, Bell, Blake & Metzner of the City of Madison; and the defendant department having appeared by Uclair W. Brandt of the defendant department's Employment Security Division, Unemployment Compensation; and the defendant employees having appeared by Attorney Albert J. Goldberg of the law firm of Goldberg, Previant & Uelmen, of the City of Milwaukee; and the Court having had the benefit of the oral argument and briefs of counsel and of the brief of amicus curiae; and the Court having

filed its Memorandum Decision wherein judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the order of the defendant Department of Industry, Labor and Human relations dated January 4, 1972, In the matter of the unemployment benefit claims of Lawrence H. Draxler, and others, Employes, Appellants, Involving the account of Kansas City Star Company, Employer, Respondent, be, and the same hereby is, reversed.

Dated this 25th of September, 1972.

By the Court:

/s/ George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 135-297

THE KANSAS CITY STAR COMPANY,
FLAMBEAU PAPER CO. DIVISION,
Plaintiff,

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, WILLIAM A. ABEL, et al.,
Defendants.

MEMORANDUM DECISION

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action to review a decision of the defendant department dated January 4, 1972, in which it was held that the individual defendants, who number approximately

340, lost their employment with the plaintiff employer in week 36 of 1971 but that such employment was not lost because of a bona fide labor dispute in active progress in the establishment in which they were employed within the meaning of Sec. 108.04(10), Stats. The department's deputy had made an initial determination that these defendant employees had lost their employment in such week due to a bona fide labor dispute in active progress in the establishment in which employed and therefore were ineligible for unemployment compensation benefits. The department's decision reversed such initial determination and allowed benefits to each of the employees if otherwise eligible.

While the matter was pending the department, pursuant to authority granted in Sec. 108.09(6)(a), Stats., transferred the proceedings to itself by order dated October 18, 1971, but the hearing was conducted before Examiner Peltin acting as the department's deputy on October 25, 1971. Thus there was not the usual Appeal Tribunal's decision.

STATEMENT OF FACTS

The employer owns and operates a paper mill in Park Falls, Wisconsin, where it manufactures and sells products in the fine paper field. It manufactures most of its own pulp from pulpwood, but also buys some pulp, and employs approximately 380 production employees. Its only facilities for storing its manufactured products are its Park Falls mill.

Part of the production employees are represented for collective bargaining by the International Brotherhood of Paper Makers and Paper Workers and its Local No. 445, and the other part by the International Brotherhood of Pulp Sulphite and Paper Mill Workers and its Local No.

119. For many years the two unions have bargained jointly with the employer and with successive single collective bargaining contracts having been entered into. The last of these contracts was dated August 1, 1969. Material provisions of this contract are:

"Section 1—CHANGE OR MODIFICATION OF AGREEMENT

"(a) This agreement shall be in effect August 1, 1969, and shall remain in effect until July 31, 1971, inclusive, and from year to year thereafter, unless terminated in accordance with the provisions of Section 2, below.

"(b) If either party shall desire to change any provision of this agreement, it shall give written notice of such desire to the other party at least sixty (60) days in advance of any anniversary date.

"(c) The giving of notice provided in subsection (b) above shall constitute an obligation upon both parties to negotiate in good faith all questions at issue, with the intent of reaching written agreement prior to the anniversary date.

"(d) If the parties have not reached agreement on or before the anniversary date, all the provisions of the agreement shall remain in effect unless specifically terminated in accordance with the provisions of Section 2, below.

"(e) In the event that the new agreement is consummated after August 1 without resort to termination under Section 2, all the provisions of said agreement shall be made retroactive to August 1.

"Section 2—TERMINATION OF AGREEMENT

"(a) At any time after the anniversary date, if no agreement on the questions at issue has been reached, either party may give written notice to the other party of intent to terminate the agreement in (not less than) thirty days. All the provisions of the agreement shall remain in full force and effect until the time set forth has elapsed. During this period, attempts to reach an agreement shall be continued.

"(b) If the parties have failed to resolve their differences before the time set forth has elapsed, all obligations under this agreement are automatically cancelled." (Exhibit 3)

On May 10, 1971, the Unions jointly gave the Employer the 60-day notice provided in Sec. 1(b) of the contract to open the contract for negotiations. The first bargaining session was held June 11th. Each side presented the other with a list of demands for changes (Exs. 6 and 7). The wage demand of the Union was an increase of 10 per cent in the first year of a new two-year contract, and 32 cents per hour during the second year. Further bargaining meetings were held July 1st and 2nd at which the Employer submitted a counter proposal of a 6 per cent raise the first year and 20 cents per hour the second. The Employer also submitted counter proposals on pensions, vacations, group insurance, and night differentials which would have increased these fringe benefits. It was either at these July 1st and 2nd meetings or the July 16th meeting that the Unions decreased their demand for a 10 per cent wage increase to 9 per cent. The Unions also conceded some of the changes in contract wording demanded by the Employer but would not agree to any changes in the work rules requested by the Employer in which it was most interested.

The next bargaining session was July 16th. In the meantime the Employer had estimated that to meet the Unions' wage demands would cost $500,000 the first year and an additional $360,000 the second year. At the July 16th meeting each side made some concessions but were still far apart on the major issues. The Unions would not agree to any of the six changes in work rules asked by the Employer, and the Employer made it clear they would have to be accepted or the Employer would not continue its wage and fringe benefits package it had offered. Draxler, president of one of the two Union Locals, then stated to the Employer representatives that a Union meeting would be arranged for contract rejection and a strike vote and asked, "How would you like that?" (Tr. 30). Sherman, assistant general manager of the Flambeau Paper Company Division, who headed the Employer's bargaining team, replied that "We were making a great effort to negotiate a contract." (Tr. 30).

Another meeting was scheduled for July 23rd. At this meeting the Unions reduced the demanded wage increase for the second year from 32 to 28 cents per hour (Tr. 32) and the Employer increased its wage offer from 6 to 6 and ½ per cent for the first year and from 20 to 22 cents per hour for the second year. (Tr. 33). Sherman, after making this wage counter proposal, asked if this was interesting enough so that "we" should continue by giving further items in the Employer's proposal (Tr. 33). The Union representatives replied that this wage proposal was entirely unacceptable, closed their books, picked up their papers and filed out of the meeting (Tr. 34). No further meeting was then scheduled.

The Unions on July 26th notified the Employer that at a joint meeting of the Union membership the last proposals of the Employer were rejected by a vote of 210 to 4 (Ex.

8) and on July 27th the Unions had taken a strike vote and had voted 291 to 19 to strike (Tr. 36).

On August 2nd the Employer sent a letter to all of its pulp wood suppliers that the threat of a strike against the paper mill "looms larger every day," and that unless an agreement was reached soon, it would be necessary to place an embargo on pulp wood deliveries. (Ex. 16; Tr. 58-59). The Employer realized that the suppliers would be harmed financially if they planned to fill orders that would be subsequently rejected. (Tr. 59).

A federal mediator stepped into the picture and a meeting between the parties was held August 5th. Both the Unions and the Employer adhered to their previous positions (Tr. 38). The Unions asked for time to caucus and at 20 minutes to 6:00 p.m. handed Sherman a contract termination notice. (Tr. 39). This notice (Ex. 10) was addressed to Sherman, signed by officials of both Unions, and read as follows:

> "Pursuant to provisions of Section 2, of our current Labor Agreement between the Flambeau Paper Company and Park Falls Local 119 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, we wish to notify you that we do hereby terminate this agreement.
>
> "We will be glad to meet with you any time during the 30 day period to try to resolve our differences."

The following letter (Ex. 11) was sent to the Unions by the Employer on August 6th:

> "We are in receipt of your letter of August 5, notifying our Company that you have terminated the Labor Contract under the provisions of Section 2.

"As a result of this action on the part of the Union, all offers heretofore made by the Company in connection with our current labor negotiations is hereby withdrawn.

"During the thirty-day interim period, if it is your desire to meet with the Company Bargaining Committee, please contact Mr. Walter Sherman."

On that same day the Employer sent a Notice of Pulpwood Embargo to all of its pulpwood suppliers (Ex. 17; Tr. 41, 62) and issued a news release which was read over Radio Station WNBI. The release stated:

"After notification by the concerned unions of a termination in the labor agreement, Norman Hoefferle, General Manager of the Flambeau Paper Company in Park Falls, announced that the orderly winding down of paper making in the face of an inevitable strike will begin with a pulpwood embargo. This embargo will cause the discontinuance of any loading of pulpwood cars for the Flambeau Paper Mill after 6:00 p.m. on Monday, August 9th. Truck delivered pulpwood will be accepted at the Flambeau Yard through Tuesday, August 10th. The Yard will be closed to trucks after 4:00 p.m. on August 10th. Mr. Hoefferle stated that the unions have voted to strike and can do so after 30 days of the offical notice which was received Thursday afternoon, August 5. All contract proposals put forth by the management of Flambeau Paper have been withdrawn, and at this time, negotiations can be resumed at the request of the unions." (Exh. 18; Tr. 64).

On August 7, 1971, the Employer sent letters to all of its suppliers of raw materials (sulphur, chlorine, etc.) with whom it had blanket orders stating that it was "declaring

a moratorium" on all incoming shipments and advising that all shipments should be "suspended" after August 9th (Exhs. 19 and 20; Tr. 41, 64, 65). After August 9, no new orders were placed by the Employer for any raw materials. (Tr. 65).

On August 10th the Employer sent over 300 letters (Ex. 21) to customers advising them that the Employer was faced with a strike September 5th and stating no further orders for cut size papers could be accepted, but was making every effort to fill its present commitments for delivery (Tr. 41, 66). No new orders were accepted after August 10th for paper which would have to be manufactured. (Tr. 67). The inevitable and almost immediate result was to cause virtually all of the Employer's customers to place their new orders with other paper mills as evidenced by the fact that normal new orders of 5200 tons per month declined to 487 tons in September and to 207 tons for October up to October 25th, the date of the hearing before the examiner (Tr. 68).

On August 15th President Nixon issued Executive Order No. 11615 (Ex. 23) stabilizing or freezing prices and wages for 90 days and establishing the Cost of Living Council to develop and make recommendations to the President for policies and mechanisms to curtail inflationary prices and wages after the expiration of the 90 day period.

On August 19th a meeting of representatives of the Employer and the Unions was held at the instigation of the federal mediator. At this meeting the Union representatives handed to Sherman two letters, one from each Union, dated August 18th (Exs. 12 and 13). The first paragraph of each letter referred to the previous letters of August 5th serving notice of contract termination and the second paragraph read as follows:

"In light of President Nixon's ninety day freeze on wages and prices, this letter will serve as a withdrawal of that termination notice and of our desire to continue to work under the terms of the existing agreement, unless, or until, a new termination is sent or full agreement reached on a new contract."

The Employer representatives then caucused, made Xeroxed copies of these two letters, and drafted a letter in response (Ex. 14) dated August 19th. On returning to the meeting Sherman handed back to the Union representatives their letters attempting to withdraw their contract termination notices (Exs. 12 and 13) and read the Employer's response thereto (Ex. 14) and delivered copies of the same (Tr. 44). The text of Exhibit 14 is:

"We are in receipt of your notice of August 18, wherein you wish to withdraw your notice of termination of contract, dated August 5.

"We can find no provision in the present labor Contract which would authorize the withdrawal of termination notice after once being tendered.

"We will accept the withdrawal notice, provided we have your guarantee in writing that it will not be reinstated prior to one year from the date of notice of withdrawal.

"The reason for the Company's position on this point, is that we have already begun winding down our operation, and we have turned down many orders in anticipation of an impending strike, and this places us in a very untenable position as far as our customers are concerned, and our ability to be a firm supplier of their needs. It is almost impossible for us to continue to insure the customer of our reliability if we are faced with a reinstatement of termination notice, at the whim of the Union.

"It is essential that we have this one year guarantee for our continued operation."

By August 19th the Employer's "winding down" process was well advanced. Even if it had immediately started on the 19th "winding up" again it had lost two weeks of orders which would have resulted in some down time in September (Tr. 74-75). However, this was not the reason which motivated the employer in refusing to accept the Unions' withdrawal of notices of contract termination without an assurance that notices of termination would not again be given within a one year period. That reason was the adverse effect on the Employer's business if one or more notices of termination were again given by the Unions within the space of a year (Tr. 79, 116). The effect on the Employer's business would be catastrophic for it would seriously impair, if not completely destroy, the Employer's reputation as a firm and reliable source of supply to its customers (Tr. 71, 79, 108, 113).

After reading Exhibit 14 at the August 19th meeting the Employer offered to extend the existing contract for a period of one year which the Unions rejected (Tr. 45). Shank, vice-president of one of the two International Unions verbally assured the Employer that the Unions would not strike during the 90 day freeze (Tr. 124). The Unions inquired what other proposal the Employer had (Tr. 45). The Employer then submitted a draft of a proposed two year contract (Ex. 15) which the Unions rejected (Tr. 45-46).

After the August 19th meeting the Employer continued its winding down operations. In a winding down procedure certain portions of the mill are shut down ahead of others when the last product passes through (Tr. 151). The first lay-off occurred on September 2nd of 23 or 24 employees and on September 3rd 22 or 23 more were laid

off (Tr. 154). The remainder of the work force continued to work through September 3rd so that the mill closed down on September 4th with no one working that day (Tr. 155).

On September 10th negotiations were resumed at the request of the federal mediator between the Unions and the Employer which was the first meeting between them subsequent to that of August 19th (Tr. 82-83). Proposals and counter proposals were exchanged. Further bargaining sessions were held September 28th and 30th, and October 1st, 5th, 6th, 15th, 18th, 19th, 20th and 22nd (Tr. 90). While not part of the record, the Employer's brief states that the parties agreed on the terms of a new agreement December 11, 1971.

THE MATERIAL PORTIONS OF THE DEPARTMENT'S DECISION

In view of the issues presented by the briefs submitted the Court deems the following to be the material portions of the department's decision:

> "The Commission does not consider that the employes lost their employment with the employer because of a bona fide labor dispute within the intent and meaning of section 108.04(10)."
>
> * * *
>
> "In view of the fact that the employer had assurance on August 18, 1971, that no strike would take place as previously threatened, the employer's actions in continuing to 'wind down' its business operations and to lay off all of its production employes on September 2 and 3 were not required, necessary or warranted business decisions on the part of the employer.

"Since the employer terminated the employment of the employes solely because of economic worries over the preservation of its relations with its suppliers and its customers, this was a business judgment and did not constitute a 'bona fide labor dispute' as contemplated by section 108.04(10). Accordingly, the employes lost their employment as a result of the employer's actions in shutting down the plant. This action in effect was a layoff which was not as a result of a bona fide labor dispute. See *Barrett* v. *Wasson Coal Co.* (1949), 404 Ill. 11, 87 N.E. 2d 769.

"The Commission therefore finds that each of the employes lost his employment with the employer in week 36 of 1971 but that such employment was not lost because of a bona fide labor dispute in active progress in the establishment in which he is or was employed, within the meaning of section 108.04 (10) of the Wisconsin Statutes."

THE ISSUES PRESENTED

In the view of the Court the briefs of the parties necessitate consideration of these issues:

1. What is the scope of the Court's power to review the above-quoted portions of the department's decision?

2. Did a bona fide labor dispute exist within the meaning of Sec. 108.04(10), Stats., at the time the Employer closed down its paper mill?

3. If Issue 2 is decided in the affirmative, did the defendant employees lose their employment because of such bona fide labor dispute?

4. Assuming September 4th as the contract termination date, was there a premature lockout which prevented there being a bona fide labor dispute?

Issue 2 will be subdivided for consideration into the following subdivisions:

(a) Definition of a bona fide labor dispute.

(b) Interpretation of Unions' notice to terminate contract.

(c) Effect of the Unions' attempted withdrawal of contract termination notices.

(d) Nature of dispute that existed between Employer and Unions at the time of closing of the mill.

(e) Does the reasonableness of Employer's position taken during the dispute effect bona fide character of the dispute?

SCOPE OF COURT'S POWER OF REVIEW

The department's brief asserts that the material determination of the department in its decision that the employees did not lose their employment by reason of a bona fide labor dispute constitutes findings of fact supported by credible evidence and therefore the Court has no power to review the same. The brief makes it clear that this argument embraces both the determination that the existing dispute between the Employer and the Unions was not a bona fide labor dispute and the holding that the employees did not lose their employment because of such dispute.

There is here no dispute with respect to any of the material facts. In such a situation if but one inference can reasonably be drawn from such undisputed facts, a question of law is presented and the finding of the department to the contrary is not binding on the reviewing court; but, if more than one inference can reasonably be drawn, then the finding of the department is conclusive. *Van Roy*

v. *Industrial Comm.* (1958), 5 Wis. 2d 416, 425, 92 N.W. 2d 818; *Schmidlkofer* v. *Industrial Comm.* (1953), 265 Wis. 535, 538, 61 N.W. 2d 862.

It is this rule which delineates the Court's scope of review in this action.

EXISTENCE OF A BONA FIDE LABOR DISPUTE

(a) *Definition*

Sec. 108.04 (10), Stats., provides:

> "An employe who has left (or partially or totally lost) his employment with an employing unit because of a strike or other *bona fide labor dispute* shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other *bona fide labor dispute* is in active progress in the establishment in which he is or was employed." (Italics added.)

Over thirty years ago the Wisconsin Supreme Court defined a "labor dispute" for purposes of Chapter 108, Stats., as "any controversy concerning . . . employment relationships, or any other controversy arising out of the respective interests of employer and employee. . ." *Spielmann* v. *Industrial Commission,* 236 Wis. 240, 295 N.W. 1, 6 (1940). This definition is in accord with familiar statutory definitions and with case authority of other jurisdictions. 29 U.S.C.A. Secs. 52, 152(9); 28 ALR 2d 287, 297 and cases cited therein.

The words "bona fide" prefixing the words "labor dispute" in Sec. 108.04(10) refer to the existence of an actual, as opposed to a pretextual, labor dispute and is designed to prevent an employer from avoiding his obligation under the law by fabricating a labor dispute and ending the employment of employees in connection therewith.

This has been the position of the department. *Cargill, Inc.*, Wis. Ind. Comm., 62-A-437 (1962); *C. Hennecke Co.*, Wis. Ind. Comm., 59-A-100 (1959); *Builders' Company*, Wis. Ind. Comm., 56-A-457 (1956). The legislature did not want an employer to be able to resist the payment of unemployment compensation where the labor dispute existed solely by the employer's own manufacture. "Bona fide" means good faith so the test is usually whether the employer acted in good faith in maintaining that a labor dispute existed. See *Cody* v. *Industrial Commission*, 1960 Dig. Wis. U.C. Cases 161 (Cir. Ct. 1939). *Perlberg* v. *Odanah Iron Co.* v. *Industrial Commission*, 1960 Dig. Wis. U.C. Cases 169 (Cir. Ct. 1955).

Before applying these definitions to the facts of this case it is necessary to analyze the Unions' notice to terminate the contract and its subsequent attempt to withdraw the same, as these play an important role as to whether a bona fide labor dispute existed at the time of the mill shutdown.

(b) *Interpretation of Unions' Notice to Terminate Contract.*

At the oral argument before the Court counsel for the employees contended that the Unions' notice to terminate the contract (Ex. 10) was ineffective because it stated no termination date since an effective notice to terminate could be given more than 30 days prior to the intended termination date. However, this notice must be interpreted in the light of the provisions of Section 2(a) of the existing contract (Ex. 3). That section provided for termination after the expiration date of July 31, 1971, by either party giving the other written notice of not less than 30 days. The second paragraph of the Unions' notice stated, "We will be glad to meet with you any time during the 30 day period to try to resolve our differences." The Employer's

letter in response dated August 6, 1971 (Ex. 11) stated, "During the thirty-day interim period, if it is your desire to meet with the Company Bargaining Committee, please contact Mr. Walter Sherman." Thus both sides understood the effective date of termination to be 30 days from August 5th which was September 4th. The Court, therefore, deems it clear that this is the interpretation which must be placed upon the Unions' notice to terminate.

The notice says nothing about a strike and, therefore, in itself is not to be interpreted as a notice that a strike would take place at the termination of the contract on September 4th. This does not mean that the Employer did not have good cause to believe a strike would then take place and to take the steps of "winding down" its mill operations during the period of August 5th to 19th.

(c) *Effect of Unions' Attempted Withdrawal of Contract Termination Notice*

The department's decision makes it clear that the department considered that the Unions had the right to unilaterally withdraw on August 19th their prior notice of termination of the collective bargaining contract. Because none of the briefs of able counsel cite any law on this question the Court assumes it is an open question in Wisconsin.

The reason why the question has been argued to this Court appears to be the decision in *A. J. Sweet, Inc.* v. *Industrial Comm.* (1962), 16 Wis. 2d 98, 114, N.W. 2d 141, 145 N.W. 2d 853. There the employees were locked out by the employer during negotiations for a new bargaining contract. Both the Commission and the Circuit Court determined that the loss of work by the claimant employees was not due to a bona fide labor dispute because the lockout violated an implied no strike and no lockout provision

of the existing contract. The Supreme Court, without expressly deciding the issue of whether a strike or lockout in violation of a no strike or no lockout provision of a labor contract would prevent there being a bona fide labor dispute, reversed on the ground there was no implied no strike and no lockout provision in the contract. However, it is logical that, where an employer does lock out his employees in knowing violation of a no strike and no lockout contract clause, he does not act in good faith and there is no bona fide labor dispute within the meaning of Sec. 108.04(10), Stats. The decision in the *A. J. Sweet, Inc.* Case is certainly open to that implication as there are cited at page 108 a Circuit Court decision and an Appeal Tribunal decision so holding.

The Unions gave their notice of termination of contract because it would put them in a position to strike, as the Unions' membership had already authorized the strike by an overwhelming vote in favor. Without the contract being terminated they could not legally strike because Section 14 contained a no strike and no lockout prohibition. They clearly deemed it advantageous to them to so terminate the contract so that they would use a strike or threat of strike to gain their large wage increase demands. Then the President's 90 day wage freeze intervened and they deemed it to their advantage to attempt to withdraw their termination notice. The Employer in the meantime had acted to its prejudice upon the termination notice and had started to wind down its operations and had notified its customers and suppliers to that effect. It had lost at least two weeks of orders and there is every likelihood some customers had placed orders elsewhere. The Employer deemed it to be to its advantage not to accede to the attempted withdrawal unless it could be assured that the Unions would not repeat the notice of termination procedure for at least a year. The Employer feared the effect

it would have on its reputation with its customers as a firm source of supply if it were forced in so short a period of less than a year to give customers notice of another impending closing of its plant and refusal of orders. The Unions refused the Employer's proposal and negotiations were at an impasse as a result of what transpired at the August 19th meeting.

It is the conclusion of the Court that one party to a contract who has given notice of termination effective 30 days hence cannot unilaterally withdraw such termination notice without the consent of the other party who has acted upon reliance of such notice of termination.

Furthermore, even if the law should ultimately be determined to be otherwise, this Court would not hold that the Employer acted in bad faith in assuming that the termination notice could not be unilaterally withdrawn when the law was as uncertain on the point as it was here.

(d) *Nature of Dispute that Existed Between Employer and Unions at Time of Closing of Mill*

The fact that the parties did not meet between August 19th and the shutdown of the mill on September 4th, or that there was in effect a Presidential order freezing wages for 90 days, does not blot out the labor dispute which existed as of September 4th. The parties were far apart on the terms of a new labor contract on issues other than wages. For example, the Unions had not acceded to any of the more important changes in work rules demanded by the employer. In addition to the impasse that existed prior to the August 19th meeting, new disputed issues developed at that meeting. These were whether the Unions had the right without the Employer's consent to withdraw their notice terminating the collective bargaining contract, and the demand of the Employer that it would not accept such

withdrawal unless the Unions agreed that no further termination of contract notices would be given for a one year period, which the Unions refused to accede to. Certainly the matter of when parties to a labor contract can give notices terminating the contract is an issue in collective bargaining which makes a dispute over such issue a labor dispute. This is especially true when upon the termination of contract the Unions would be put in a position to strike.

There is an implication in the department's decision that it considered the Presidential 90 day freeze on wage increases, together with the Unions' verbal assurance that they would not strike during those 90 days, as obliterating any labor dispute between the parties. This just was not so. The Employer was vitally concerned with not having to go through another winding down process involving notifying customers and suppliers of an impending close-down of operations any time in a year period, not just a 90 day period. Undoubtedly the Unions had as deep a concern for not tieing their hands against striking for a year period, thus giving up their most effective weapon in negotiating the terms of a new contract.

The Court deems it advisable, in view of arguments advanced to it, to comment with respect to the statutory words "or other bona fide labor dispute in active progress" of Sec. 108.04 (10), Stats. A lockout legally resorted to by an employer in good faith as a weapon to gain objectives from the union in a labor dispute constitutes a "bona fide labor dispute in active progress" so long as it retains its original character.

There existed no basis upon the undisputed evidence in this case for a determination that a labor dispute did not exist between the parties as of September 4, 1971, when the Employer's mill closed down. Further, no basis exists for contending that this was a pretextual and not an actual labor dispute.

(e) *Does the Reasonableness of the Employer's Position Effect the Bona Fide Nature of the Dispute?*

The department took the unusual course in its decision of passing on the reasonableness of the Employer's position in the labor dispute by stating:

> "In view of the fact that the employer had assurance on August 18, 1971, that no strike would take place as previously threatened, the employer's actions in continuing to 'wind down' its business operations and to lay off all of its production employes on September 2 and 3 were not required, necessary or warranted business decisions on the part of the employer."

This constitutes a sharp break from the past position taken by the department (formerly the Industrial Commission) even since the enactment of the Wisconsin Unemployment Compensation Act, that the legislative policy underlying this Act was for the State to maintain a position of neutrality in labor disputes in administering it. In *Marathon Electric Mfg. Corp.* v. *Industrial Comm.* (1955), 269 Wis. 394, 69 N.W. 2d 573, 70 N.W. 2d 576, the Wisconsin Supreme Court quoted this extract from the Commission's brief (at p. 405):

> "Since the enactment of the first unemployment compensation law in 1931 the law has contained a provision suspending eligibility of workers unemployed because of a strike or a bona fide labor dispute. The labor dispute provision constitutes a 'neutrality act' which the legislature inserted into the Act. It is to be borne in mind that the unemployment compensation act was prepared by representatives of labor and management and the public. In designing this legislation, it was the fear of both employer and employe representatives that payment of unemployment com-

pensation, unless appropriate safeguards were taken, might prove to be an instrument which might be inappropriately used, their respective interests considered, in an industrial controversy. An analysis will show the wisdom from both the standpoint of labor and of management of suspending benefit payments in any situation in which these industrial forces are engaged in a bona fide controversy. This suspension of benefits places the administrative agency in a neutral position with respect to the contending forces.

"Under the Wisconsin law, employer contributions finance the unemployment benefits paid to workers. Management, therefore, is not desirous that the funds built up by it could be used to finance a strike or other form of labor controversy directed against it. Present law takes a 'hands off' approach. *It stays neutral.* It does not require that the administrative agency determine the merits of the labor dispute. *If there is a controversy or labor dispute, then the disputants, are ineligible for unemployment benefits during the active progress of such dispute.*"

The courts of New York and California have taken the same position, that the Commission administering a state unemployment compensation act is to maintain a position of neutrality in labor disputes without giving consideration to the elements of whom it believes to be in the wrong. The New York Court of Appeals speaking through Judge Fuld in *Hooker Chemical Corporation* v. *Catherwood* (1966), 19 N.Y. 2d 1, 7, 224 N.E. 2d 72, 75-76, stated:

". . . even in those disputes which are precipitated by the apparent breach of an existing agreement, the determination of fault or misconduct involves questions of labor relations that are frequently complicated and recondite. It would have been decidedly unwise

> to vest in officials of a social welfare agency—like those administering the Unemployment Insurance Law —the power to decide such matters. They are best left to agencies especially qualified to deal with them, namely the Federal and State Labor Boards and labor arbitrators."

Similarly the California court declared in *W.R Grace Co.* v. *California Employment Commission* (1944), 24 Cal. 2d 720, 151 Pac. 2d 215, 221:

> "It is not the function of the Commission to evaluate the merits of a controversy between an employer and his employees; if a trade dispute exists and the employee leaves his work because of it he may not receive benefits even though the employer is in the wrong."

Because the acknowledged legislative policy underlying the Wisconsin Unemployment Compensation Act was that the department is to maintain a position of neutrality in administering the Act, the department violates the Act and exceeds its powers if it decides that in its view one of the parties to a labor dispute has taken an unreasonable position and because of it an existing labor dispute is not a *bona fide* one within the meaning of Sec. 108.04(10), Stats.

In order for the department in this case to determine that the existing labor dispute as of September 4, 1971, was not *bona fide* there would have to exist evidence from which it could be reasonably inferred that the Employer pretended a labor dispute existed between the parties which did not exist. The undisputed evidence simply will not support drawing such an inference.

DID THE DEFENDANT EMPLOYEES LOSE THEIR EMPLOYMENT BECAUSE OF THE EXISTENCE OF SUCH BONA FIDE LABOR DISPUTE?

Because an existing *bona fide* labor dispute exists between an employer and his employees at the time of loss of employment it does not necessarily follow that the loss of employment was due to such *bona fide* labor dispute. Here the department specifically found it was not, because the employment of the employees was terminated by the employer "solely because of economic worries over the preservation of its relations with its suppliers and its customers" which "was a business judgment." (P. 6 of decision).

During the course of the hearing while Hoefferle, the president and resident general manager of the Employer's Flambeau Paper Company Division, was on the witness stand he was asked some questions by the examiner (Tr. 111-119). During this questioning by the examiner Hoefferle was asked about the Employer's demand at the August 19th meeting that, as a condition to the Employer consenting to the Unions withdrawing the contract termination notice, the Unions assure the Employer that no further termination notices would be given by them for a one year period. These questions were then asked and these answers given by the witness (Tr. 116):

"Q. Your plan was to continue on negotiations? The only thing you insisted upon was no—
A. Strike.
Q. Notice of termination?
A. Right.
Q. And, in fact, no strike?
A. Right. We want a contract. We want to run our mill but we can't do it on, on the basis that, that we

are not assured whether we are going to be allowed to operate because of a reinstatement of the termination notice and a strike.

Q. Yes, well, of course, once the union agreed not to strike, that takes away their weapon, of course, and that is what you were insisting on here, weren't you?

A. Well, yeah, but for different reasons. I suppose that is true.

Q. Well—

A. Not for reasons that they would be put in an unfavorable bargaining position. We were looking for that twelve months no strike agreement for business reasons, and for our protection and for our customers.

Q. Well, you were quite a ways apart in your negotiations?

A. Yes, we were.

Q. That has been developed pretty thoroughly."

The Court is satisfied that the department's finding that the Employer terminated the employment of the employees solely as a business judgment made "because of economic worries over the preservation of its relations with its suppliers and its customers" is grounded upon the next to the last above-quoted answer given by Hoefferle. No other evidence has been found by the Court in reading the transcript which tends to support such finding, and none has been cited in the briefs in behalf of the employees and the department.

It is impossible to divorce such business judgment from the context of the existing labor dispute. The preceding above-quoted answers of Hoefferle make this very clear. There is not one iota of testimony that any business purpose of the Employer would have been promoted by the shutdown of the mill on September 4th other than to protect itself against a future notice of contract termination by the Unions with the concomitant threat of strike.

This was at the heart of the then labor dispute between the parties.

A perfect illustration of when an employer's termination of employment is for a purpose apart from a labor dispute is afforded by the case of *Barrett* v. *Wasson Coal Co.* (1949), 404 Ill. 11, 87 N.E. (2d) 769, cited by the department at page 6 of its decision in support of its holding that the Employer's termination of employment in this case was due solely to a business judgment. In that case the employer ceased production because it did not want to continue operation until it knew what a change in the post World War II economic operations would mean as to the allowable price for its coal. As the Illinois court stated (87 N.E. 2d at p. 771):

> "The evidence shows that the company, feeling insecure under the then governmental price regulations did not care to gamble on the future outcome of conditions and its ability to continue meeting its payroll. . . . There was no dispute concerning hours or terms of employment about which the parties were trying to agree."

If any one fact was established before the department in the case at bar, it was that there was a grave dispute between the parties as to wages, hours and conditions of employment. In addition, in mid-August, a further dispute between the parties arose concerning the Unions' right under the Agreement to withdraw their notice of termination and their refusal to give assurance that notices of termination would not again be tendered in the near future. Nevertheless, the department ignored these clear facts in its decision and supported that decision with authority wholly inapposite to the situation before it.

The piece of evidence which best establishes why the Employer considered that its own business interests and

those of its customers would be promoted by the winding down and closing of its mill operations is provided by the closing paragraph of the letter dated August 10, 1971 (Ex. 21) which it sent to over 300 of its customers which stated:

> "If you have any questions concerning this action on our Company's part, please do not hesitate to call as we are taking a firm position with the unions in an effort to keep the mill profitable and to make us a better supplier for you."

The briefs in behalf of the employees and the department point to no other evidence establishing a business purpose to be served by such closing down, nor do these briefs suggest any other purpose for closing the mills.

Courts have consistently held that a labor dispute exists where an employer ceases operation in order to avoid the potential injury of a threatened strike and that those who lose their employment in such circumstances are ineligible for unemployment compensation benefits. *Revere Sugar Refinery* v. *Marshall,* CCH Unemployment Comp. ¶1980.1459 [Mass. (Boston) 1947]; *Lezuch* v. *Employment Security Council,* CCH Unemployment Comp. ¶1980.1458 (Mich. Cir. 1958); *Schoenweisner* v. *Board,* (1957) 44 N.J. Super. 377, 130 A.2d 648; *Hall* v. *American Brake Shoe Co.,* (1965) 13 Ohio Misc. 35, 233 N.E. 2d 342. Thus, in *Department* v. *Savage,* 82 So. 2d 435 (Ala. App. 1955), a labor dispute which rendered the employees ineligible for unemployment compensation benefits was established by proof that the union had threatened a strike and the employer had acted to protect itself by ceasing production. Similarly in the instant case, the Employer acted to neutralize the Unions' economic weapon and to protect itself and others in light of the certain disruption arising from the continuing labor dispute. As previously stressed herein there is entirely lacking here of evidence

giving rise to any inference that the motivation of the Employer for closing the mill and laying off the employees was for any reason not directly related to the existing labor dispute.

It is probably immaterial whether the layoff by reason of such closing of the mill was technically a lockout or not. The Court deems that it was. *A.J. Sweet, Inc.* v. *Industrial Comm., supra,* in accord with a consistent twenty-three year interpretation by the Industrial Commission, held that where unemployment results from a lockout precipitated by a *bona fide* labor dispute the employees are disqualified for benefits under Sec. 108.04(10), Stats.

ASSUMING SEPTEMBER 4TH AS THE CONTRACT TERMINATION DATE, WAS THERE A PREMATURE LOCKOUT WHICH PREVENTED THERE BEING A BONA FIDE LABOR DISPUTE?

At page 6 of the department's decision it is stated:

> "The employer's actions in laying off over 20 employes on September 2, and about the same number on September 3, were in direct violation of contract provisions that there would be no lockouts during the period of the agreements. Accordingly, if these actions amounted to lockouts, these lockouts would not be bona fide labor disputes."

Some 22 to 24 employees were laid off on September 2nd and approximately the same number on September 3rd (Tr. 154-156). The reason they were laid off before September 4th was that in order to close down the mill some departments at the early stages of the manufacturing process will run out of production before the remaining departments (Tr. 151, 156). As the examiner observed, "Naturally some processes are finished before the other ones" (Tr. 156). These employees were not laid off

ahead of September 4th for purposes of lockout but because of lack of production. There is nothing in the contract (Ex. 3) which prevents layoffs due to lack of production. Their lack of employment commencing on the fourth was due to the lockout. The unemployment of these 40 odd employees on the second and third could count towards weeks of unemployment for benefits unless barred by provisions of Chapter 108, Stats., other than Sec. 108.04 (10). As September 4th was Saturday and the last day of the work week, these employees were probably barred from counting that week as one of partial unemployment because of their earnings for that week being above their weekly benefit rate. Sec. 108.02(16), Stats.

The brief on behalf of the employees raises the point that the termination date of the contract under the Unions' notice of termination was September 4th and that the Employer had no right to lockout until the following day. No authorities are cited by the parties on this point of the right to lockout on the termination date of the contract. Under Section 1(a) of the contract (Ex. 3) it is clear that the period of the contract included the termination date of July 31, 1971. Therefore, it would seem that a 30 day termination notice would mean the contract remained in effect the 30th day or September 4th. The above-quoted paragraph of the decision would by implication indicate that a lockout on September 4th was not illegal, assuming the withdrawal of the termination notice was not effective.

The Court does not consider that if an employer is one day too early in locking out his employees that this renders the whole lockout illegal, but only the first day.

CONCLUSION

To restate the ultimate conclusion of the Court, it is the Court's determination that the undisputed evidence gives rise to but one reasonable inference with respect to

three crucial issues: in the case, and these inferences are: (1) a labor dispute existed between the Employer and the Unions at the time of the closing of the mill on September 4, 1971; (2) such labor dispute was a *bona fide* one; and (3) the unemployment of the employees resulted from a *bona fide* labor dispute within the meaning of Sec. 108.04 (10), Stats. Therefore, there is no credible evidence to sustain the findings by the department to the contrary.

Let judgment be entered reversing the department's decision dated January 4, 1972.

Dated this 25th of September, 1972.

/s/ George R. Currie
Reserve Circuit Judge

No. 259

August Term, 1973

STATE OF WISCONSIN : IN SUPREME COURT
The Kansas City Star Co.,
Flambeau Paper Co. Division,
Respondent,

v.

Dept. of IL&HR, William A. Abel,
et al.,
Appellants.

OPINION OF THE WISCONSIN SUPREME COURT

(Filed October 30, 1973)

APPEAL from a judgment of the circuit court for Dane county: GEORGE R. CURRIE, Reserve Circuit Judge, Presiding. *Reversed.*

This case involves a claim for unemployment compensation. The Kansas City Star Company, Flambeau Paper

Company Division (respondent and hereinafter referred to as employer) operates a paper mill in Park Falls, Wisconsin, and employs there approximately 380 production workers. Most of the employees are represented by either the United Papermakers and Paperworkers, Local No. 445, or the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local No. 119. These two unions have bargained jointly with the employer for the past thirty years, and recently had a two-year contract dated August 1, 1969.

Section 1 of this contract provided that it:

> ". . . shall be in effect August 1, 1969, and shall remain in effect until July 31, 1971, inclusive, and from year to year thereafter, unless terminated in accordance with the provisions of Section 2, below."

The agreement also provided that any party who desired to change any provision of the contract must give written notice of such desire to the other party at least sixty days in advance of the contract's anniversary date. If such notice was given negotiations would commence and if agreement was not reached before the anniversary date of the contract, the terms of that contract would continue in effect unless it was specifically terminated as provided in section 2.

Section 2 provided:

> "(a) At any time after the anniversary date, if no agreement on the questions at issue has been reached, either party may give written notice to the other party of intent to terminate the agreement in (not less than) thirty days. All the provisions of the agreement shall remain in full force and effect until the time set forth has elapsed. During this period, attempts to reach an agreement shall be continued.

"(b) If the parties have failed to resolve their differences before the time set forth has elapsed, all obligations under this agreement are automatically cancelled."

Both unions gave the requisite notice to the employer by letters dated May 10 and 12, 1971, that certain contract provisions should be renegotiated. Bargaining sessions were conducted on June 11th and intermittently thereafter for approximately six weeks. The unions sought increased wages and changes in fringe benefits such as pensions, vacations and group insurance. The employer sought changes in certain work rules, wage differentials and contract language. Initially, the unions sought a wage increase of 10 percent (minimum 29 cents per hour) for the first year and an increase of 32 cents per hour during the second year. During meetings on July 1st and 2d the employer offered a wage increase of 6 percent (no minimum) the first year and 20 cents per hour the second year. Other counter offers were made regarding fringe benefits. The employer's most important proposed work rule changes were not accepted. On July 23d the employer increased its proposed wage hike for the first year to 6 1/2 percent and for the second year to 22 cents per hour. These proposals were not satisfactory to the unions and it appeared that an impasse had been reached. On July 26th a joint meeting of the members of both unions was held and these latest proposals of the employer were rejected by a vote of 210 to 4. Moreover, the employer was notified that on July 27th the unions had agreed to strike by a vote of 291 to 19. A federal mediator then requested that a meeting be held on August 5th, but the unions and the employer adhered to their previous positions at that meeting. At the end of the meeting, both unions tendered notices to the employer that stated, under section 2 of the labor agreement "we do hereby terminate [the/this] agreement." Both

notices advised that the unions would be willing to meet any time during the requisite thirty-day period to try to resolve their differences.

On the following day, August 6th, the employer mailed each union a letter which stated it had received the unions' letters of August 5th. In its letters of August 6th the employer stated that, as a result of the unions' actions, all offers made earlier in the current negotiations were withdrawn and in the thirty-day interim period, if it was the unions' desire to meet with the company bargaining committee, they were to contact the assistant general manager and employer negotiator.

Meanwhile, on August 2d the employer notified its pulpwood suppliers of the threat of a strike in its plant and that unless an agreement was reached soon it would be necessary to discontinue receiving pulpwood. On August 6th the employer sent a notice of pulpwood embargo to its suppliers and a radio news release was issued in an attempt to notify those suppliers who might be out in the woods; the employer was discontinuing receiving pulpwood by railroad cars as of August 9th and by truck as of 4 p. m. on August 10th. No further orders for materials were placed and those suppliers with blanket orders were notified not to ship. Over 300 letters were sent to the employer's customers notifying them that it would be incapable of filling any orders that specified a delivery date beyond September 4th in order that those customers could arrange for another source of supply. The consequent result was that the employer's new orders went from an average 5,105 tons per month down to 487 tons in September, and 275 tons for October 1st through October 25th. The employer's shipments went from an average of 5,198 tons per month to 329 tons in September, and 545 tons in October. Some paper had to be purchased from other

sources in order to fulfill the customers' needs for which the employer had already committed itself.

On August 15th, by Executive Order No. 11615, President Nixon ordered a freeze on prices, rents, wages and salaries for ninety days. At a meeting on August 19th of the unions and the employer held at the request of the federal mediator, both unions submitted substantially similar letters in which they referred to their letters of August 5th, giving notice of contract termination. Both letters of August 18th stated in part:

> "In light of President Nixon's ninety day freeze on wages and prices, this letter will serve as a withdrawal of that termination notice and of our desire to continue to work under the terms of the existing agreement, unless, or until, a new termination is sent or full agreement reached on a new contract."

On August 19th the employer answered these latest letters of the unions, stating that it could find no provision in the present labor contract which authorized the withdrawal of the unions' termination notices after once being tendered. The employer offered to accept the withdrawal notices provided it would have the unions' guarantee in writing that the notices of termination would not be reinstated prior to one year from the date of notice of withdrawal. The employer gave as a reason for its position on this point that it had already begun winding down operations and had turned down orders in anticipation of an impending strike, and that this placed it in a very untenable position as far as its customers were concerned, and its ability to be a firm supplier of their needs. In its letter, the employer further stated that it was almost impossible for it to continue to insure its customers of its reliability if it was faced with a reinstatement of termination notice, and that it considered it essential to have a one-year guarantee.

There is conflict in the testimony whether the unions had given oral assurances to the employer that they would not strike for ninety days. The employer testified that no such assurance had been made, whereas Mr. Shank, a union vice-president, claimed it had.

The employer proceeded to wind down its operations until September 2d, when approximately 24 employees were laid off. Approximately 23 more were laid off at the beginning of the business day on September 3d, and the remaining employees were laid off at the end of the business day on September 3d. On September 4th the plant did not operate and no employees worked.

On September 10th the employer offered to withdraw its demand for certain changes in work rules and to give a 4 percent across-the-board increase in wages in return for a one-year extension of the present contract. The unions refused, but offered to extend the contract for a 6 1/2 percent across-the-board increase. No agreement was reached and further sessions were also conducted on September 27th, 28th, 30th and October 1st, 5th, 6th, 15th, 18th, 19th, 20th, and 22d. Apparently, on December 11th, the parties agreed to the terms of a new contract.

After work at the employer's plant had discontinued, the employees filed for unemployment compensation. The employer claimed that these employees had lost their employment as a result of a bona fide labor dispute in active progress and, therefore, were not entitled to unemployment benefits under sec. 108.04 (10), Stats.

An initial determination was filed on September 24th by a deputy of the unemployment compensation division which was in accord with the employer's position that the employees had lost their employment as a result of a bona fide labor dispute in active progress and were disquali-

fied for benefits by sec. 108.04 (10), Stats., which section provides as follows:

> "LABOR DISPUTE. An employee who has left (or partially or totally lost) his employment with an employing unit because of a strike or other bona fide labor dispute shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

This determination was appealed and while pending, the Department of Industry, Labor & Human Relations (ILHR Department), pursuant to authority granted in sec. 108.09 (6) (a), Stats., transferred the proceedings to itself by order dated October 18, 1971. A hearing was conducted before Examiner Max J. Peltin, acting as the commission's deputy, on October 25th consolidating all the claims of the employees. On the basis of this hearing, the commission voted two-to-one to reverse the initial determination of the deputy.

Specific findings were entered, as pertinent here, as follows :

> ". . .
>
> "The Commission does not consider that the employees lost their employment with the employer because of a bona fide labor dispute within the intent and meaning of section 108.04 (10).
>
> "The employees had the contract right to terminate their agreements upon 30-day notices pursuant to section 2. They gave the employer such notices. The employees also took a strike vote and gave approval to the union officers to call a strike after the contracts were terminated.

"The employees' actions were in accordance with the contract provisions and appeared in good faith. At most the strike vote was an indication that a strike might occur.

"In 1969 the unions served 30-day termination notices upon the employer as provided by section 2 of the contract. No strike occurred in 1969 because agreement was reached immediately prior to the end of the 30-day period by the unions and the employer. During this period the employer did not give any notices to suppliers and customers of the contract termination or attempt to in any way 'wind down' its operations.

"The employer knew on August 19, 1971, that the employees would not strike after the termination of the contract on September 3, because of the unions' letters withdrawing the termination notices and indicating a willingness to continue to work under the terms of the existing contracts until new terminations of the contracts were sent or new contracts consummated.

"The employer refused to accept the unions' withdrawals of the contract terminations unless the unions agreed in writing that new contract terminations would not be reinstated for a one-year period.

"The employer's contention that the termination notices were strike threats loses its persuasiveness in view of the employee's withdrawal of the termination notices. It appears that the good faith efforts by the unions to continue the contracts required the employer to accept the withdrawal notice even though the contract is silent as to the unions' right to withdraw the termination notices.

"The employer's actions in laying off over 20 employees on September 2, and about the same number on September 3, were in direct violation of contract provisions that there would be no lockouts during the period of the agreements. Accordingly, if these actions amounted to lockouts, these lockouts would not be bona fide labor disputes.

"In view of the fact that the employer had assurance on August 18, 1971, that no strike would take place as previously threatened, the employer's actions in continuing to 'wind down' its business operations and to lay off all of its production employees on September 2 and 3 were not required, necessary or warranted business decisions on the part of the employer.

"Since the employer terminated the employment of the employees solely because of economic worries over the preservation of its relations with its suppliers and its customers, this was a business judgment and did not constitute a 'bona fide labor dispute' as contemplated by section 108.04 (10). Accordingly, the employees lost their employment as a result of the employer's actions in shutting down the plant. This action in effect was a layoff which was not as a result of a bona fide labor dispute. See *Barrett* v. *Wasson Coal Co.* (1949), 404 Ill. 11, 87 N. E.2d 769.

"The Commission therefore finds that each of the employees lost his employment with the employer in week 36 of 1971 but that such employment was not lost because of a bona fide labor dispute in active progress in the establishment in which he is or was employed, within the meaning of section 108.04 (10) of the Wisconsin Statutes."

After the complaint was filed asking review of the Department's position by the circuit court for Dane county,

a judgment reversing the Department's decision was entered. In its memorandum decision the trial court determined that the evidence gave rise to but one reasonable inference with respect to three crucial issues: (1) A labor dispute existed on September 4, 1971; (2) this labor dispute was bona fide; (3) the unemployment of the employees resulted from a bona fide labor dispute within the meaning of sec. 108.04 (10), Stats.

The Department and the individual claimants appeal. Further facts are set forth in the opinion.

WILKIE, J. The two issues that are dispositive of this appeal are:

1. What is the meaning of a bona fide labor dispute as set forth in sec. 108.04 (10), Stats.?

2. Does the evidence support the findings by the Department that the employees did not lose their employment because of a bona fide labor dispute in active progress in the establishment in which they were employed?

Meaning of Bona Fide Labor Dispute.

A "labor dispute" within the meaning of sec. 108.04 (10), Stats., is " 'any controversy concerning . . . employment relations, or any other controversy arising out of the respective interests of employer and employee. . . .' "[1]

The term "bona fide" is not specifically defined in ch. 108, Stats., and therefore it must be "interpreted in accordance with the common and approved usage thereof and in accordance with other accepted rules of statutory construction."[2] The term generally " 'signifies a thing done really, with a good faith, without fraud or deceit, or

1. *Spielman* v. *Industrial Comm.* (1940), 236 Wis. 240, 250, 295 N. W. 1; *Kenneth F. Sullivan Co.* v. *Industrial Comm.* (1964), 25 Wis.2d 84, 88, 130 N. W.2d 194; *accord*, Annot. (1953) 28 A.L.R.2d 287, 297.

2. Sec. 108.02(21), Stats.

collusion . . .' . . . Bona fide means real, actual, genuine. . . ."[3]

The term "bona fide labor dispute," within the disqualifying sec. 108.04 (10), Stats., means a controversy regarding the terms of employment which in fact exists and is not merely pretextural or feigned on the part of the employer in an attempt to avoid his obligations under the law.

One of the purposes of the Unemployment Compensation Act was to "prevent an employer from financing a strike against himself."[4]

Department's Finding of Fact—No Bona Fide Labor Dispute.

A benefit claimant is presumed eligible for benefits and the party (the employer here) resisting payment of benefits has the burden of proving that the case comes within the disqualifying provision of the law (here, a bona fide labor dispute existed).[5]

In reviewing the Department's finding that the unemployment of the employees was not because of a bona fide labor dispute in active progress our standard of review is of course that we must accept the Department's determinations on such findings of fact if supported by credible evidence on the record as a whole.[6] The credibility of the witnesses and the weight of the evidence is within the province of the Department.[7] In *R. T. Madden, Inc.* v.

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3. *Bridgeport Mortgage & Realty Corp.* v. *Whitlock* (1941), 128 Conn. 57, 61, 20 Atl.2d 414.

4. *Kenneth F. Sullivan Co.* v. *Industrial Comm., supra,* footnote 1, at page 88.

5. *Boynton Cab Co.* v. *Giese* (1941), 237 Wis. 237, 296 N. W. 630.

6. *Milwaukee Transformer Co.* v. *Industrial Comm.* (1964), 22 Wis.2d 502, 509, 510, 126 N. W.2d 6.

7. *Neff* v. *Industrial Comm.* (1964), 24 Wis.2d 207, 213, 128 N. W.2d 465; *Copland* v. *Department of Taxation* (1962), 16 Wis.2d 543, 555, 114 N. W.2d 858.

ILHR Department,[8] this court extensively reviewed the tests which had been used to explain the proper scope of review and held:

> "It is our conclusion the test should be whether there is any credible evidence in the record sufficient to support the finding made by the department. The assumption in that test is, of course, that the evidence is relevant, that it is evidentiary in nature and not a conclusion of law, and that it is not so completely discredited by other evidence that a court could find it incredible as a matter of law. This is clearly not the same as a reviewing court's weighing conflicting credible evidence to determine what shall be believed."

Moreover, "[i]f conflicting inferences may be drawn from the evidence, it is the function of the department to conclude which inference (if reasonable) . . . and not the function of this court."[9] In *Kessler* v. *Industrial Comm.*[10] this court explained:

> "[W]here the evidentiary facts are not in dispute but permit of different inferences the drawing of one of such inferences is a finding of fact within the province of the Industrial Commission. *Gant* v. *Industrial Comm.* (1953), 263 Wis. 64, 56 N. W. 2d 525. This court has held, however, . . . that if the evidentiary facts are not in dispute and permit of only one reasonable inference, the drawing of that inference is a question of law and not of fact. . . ."

The Department made lengthy findings, which we have already quoted, amplifying its determination that

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8. (1969), 43 Wis.2d 528, 547, 169 N. W.2d 73.

9. *Baez* v. *ILHR Department* (1968), 40 Wis.2d 581, 585, 162 N. W. 2d 576; *Fitzgerald* v. *Globe-Union, Inc.* (1967), 35 Wis.2d 332, 337, 151 N. W. 2d 136.

10. (1965), 27 Wis.2d 398, 400, 134 N. W. 2d 412.

"The Commission does not consider that the employees lost their employment with the employer because of a bona fide labor dispute within the intent and meaning of section 108.04 (10)."

Although there is a dispute on the record as to whether or not the employer was given notice that there would be no renewal of the termination notice while the price and wage freeze was in effect, there was clearly evidence that the employer was given oral assurance of this. This is a factual determination which is within the Department's responsibility to make.

The Department, having decided that the termination notice had been withdrawn, could have determined as a matter of fact that the layoffs were not while a bona fide labor dispute was in progress but were by way of a layoff for economic reasons.

In concluding that the loss of employment in this case was not due to a bona fide labor dispute, the Department relied heavily on *Barrett* v. *Wasson Coal Co.*[11] In *Barrett*, an Illinois coal mine was closed down pending negotiations of a new contract and the employer tried to defeat the employees' claim of unemployment benefits by asserting sec. 7 (d) of the Illinois Unemployment Compensation Act (Ill. Rev. Stat. 1947, ch. 48, par. 223). This was a labor dispute exception similar to sec. 108.04 (10), Stats. The owner of the mine claimed he refused to sign the labor contract because he did not understand its terms. However, during negotiations, the owner explained, " 'I can't operate until the government lets me know for sure what I am going to get for the coal.' "[12] The Division of Unemployment Compensation found, and the Supreme Court of Illinois agreed, that ". . . there was no labor dis-

11. (1949), 404 Ill. 11, 87 N. E. 2d 769.

12. *Id.* at page 14.

pute. . . . There was no dispute concerning hours or terms of employment about which the parties were trying to agree."[13] The loss of employment in that case was not because of a labor dispute but because the government's policy on coal had not been clearly established, a circumstance beyond the control of both parties. In the present case, the immediate cause of the lack of jobs was the rapid decline in orders for paper and the general winding down of operations by the employer. Customers and suppliers were notified and operations were wound down. With the attendant decrease in orders and general business at the paper mill, soon there was no work to be done. The plant was shut down. Although there is no evidence here which indicates the employer had an independent reason, such as the governmental policy regarding coal in *Barrett*, for closing its paper mill, from the record as a whole the Department could find that a bona fide labor dispute did not exist at the time of the layoff and the layoffs were for business reasons, the reasons being the kind designed to give rise to legitimate unemployment compensation claims within the framework of the Wisconsin Unemployment Compensation Law.

By the Court.—Judgment reversed.

ROBERT W. HANSEN (*concurring*). When their former employer closed down the paper plant in which they had been working, the former employees applied for unemployment compensation benefits for the weeks of joblessness that followed the permanent closing of their former place of employment. Even if a labor dispute was involved in the management decision to close the plant down, the former employees are entitled to unemployment compensation benefits under sec. 108.04(10), Stats., except ". . . for any week in which such . . . bona fide labor dispute *is in active progress* in the establishment . . ."

13. *Id.* at pages 16, 17.

in which they were employed. [Emphasis supplied.] With the plant permanently closed, there was no labor dispute left, much less one in active progress. There was no employer or employees to do the disputing. There was only a former employer and its former employees. There were no wages, hours or working conditions about which to dispute. Payroll and positions ended when the plant closed down. Whatever its reasons for so doing, when management permanently closed down the paper plant, any disagreement with its former employees was interred along with the plant operations. The state agency holding that the former employees are entitled to unemployment compensation benefits is upheld solely for the reason that a permanently closed mill or factory cannot have a labor dispute in active progress any more than a corpse can have a toothache.

I am authorized to state that Mr. Justice Bruce F. Beilfuss and Mr. Justice Connor T. Hansen join in this concurring opinion.

DECISION OF THE WISCONSIN SUPREME COURT ON MOTION FOR REHEARING

THE KANSAS CITY STAR CO. v. DEPT. OF INDUSTRY, LABOR AND HUMAN RELATIONS et al., #259

On the motion for rehearing herein, IT IS ORDERED that additional briefs be submitted on the following question and on such further issues as counsel deems appropriate:

> Did the unions have a right to withdraw the employment agreement termination notice that was given?

Printed briefs shall be filed as follows: Respondents on or before February 18, 1974; Appellants Reply on or before March 10, 1974; Respondents reply on or before March 20, 1974.

OPINION OF THE WISCONSIN SUPREME COURT ON REHEARING

(Filed May 8, 1974)

No. 259

August Term, 1973

STATE OF WISCONSIN : IN SUPREME COURT

The Kansas City Star Co.,
Flambeau Paper Co. Division,
Respondent,

v.

Dept. of IL&HR, William A. Abel,
et al.,
Appellants.

PER CURIAM (*on motion for rehearing*). The employment contract did not spell out the terms of the right of the Union to withdraw its termination notice, nor the existence of a right of the Union to reinstate that notice prior to the ending date of the contract. In the absence of a specific provision in the contract as to the right to withdraw a termination notice, the Department found that the Union withdrew its termination notice and the Department further found that as to the subsequent layoffs there was then no bona fide labor dispute in progress. These findings were supported by credible evidence as discussed in our original opinion.

We do not reach the question now raised for the first time by the employer asserting estoppel as to either the "Department" or the Union. Estoppel was not asserted before the Department nor was there any point made of it either in the record before the Department or in the trial court.

ROBERT W. HANSEN (*concurring in denial of motion for rehearing*). In *A. J. Sweet, Inc.* v. *Industrial Comm.* (1961), 16 Wis. 2d 98, 114 N.W. 2d 141, 114 N.W. 2d 853, this court considered whether a loss of work by claimant employees due to lockout or plant shutdown by an employer constituted a *bona fide* labor dispute under sec. 108.04(10) of the state unemployment compensation act. On the issue of whether a labor dispute was *bona fide* within the meaning of the statute, this court in *Sweet* held that ". . . resolving this issue involves the construction of the agreement between the parties. . . ." (*Id.* at page 105.) In *Sweet*, this court found that the collective bargaining contracts between the parties ". . . contained no express language prohibiting either strikes or lockouts during their term. . . ." (*Id.* at page 106.) The court held that the contracts contained no express provision or implied promise that ". . . the employers would not utilize the device of a lockout. . . ." (*Id.* at page 110.) It necessarily followed, the court concluded, that the claimant employees' loss of time from work was ". . . due to a *bona fide* labor dispute within the meaning of sec. 108.04 (10), Stats." (*Id.* at page 110.) In the case before us, the existing agreement between employer and employees expressly provided that: "The Company agrees that there will be no lockouts during the period of this Agreement." (labor agreement, page 20.) The employees' organization had filed, pursuant to the agreement, a termination of agreement notice. Subsequently and prior to the lockout, the labor group withdrew that notice, stating: "In light of President Nixon's ninety day freeze of wages and prices, this letter will serve as a withdrawal of that termination notice and of our desire to continue to work under the terms of the existing agreement, . . ." until a new agreement was reached or new termination notice sent. Under the ruling in *Sweet*, the writer would on this set of

facts hold that claimant employees' loss of time from work for which they seek unemployment benefits was not due to a *bona fide* labor dispute within the meaning of sec. 108.04 (10), Stats. Where the claimant employees had clearly indicated their willingness to continue work under the existing agreement, the writer would further hold that the labor dispute was not "in active progress" within the meaning of sec. 108.04 (10), Stats. The employer here notified the claimant employees: "The entire mill will be shut down effective no later than the end of the last shift on September 3, 1971, and until further notice." Whether this notice and shutdown is considered, as it was in concurring opinion, as a permanent closing down of operations, or, as it has been here, as a temporary lockout, it does not under the facts here constitute what the statute requires for disqualification from benefits of employees who have lost time from work due to a lockout precipitated by a *bona fide* labor dispute that was *in active progress.*

CONNOR T. HANSEN, J. (dissenting from denial of motion for rehearing). The Kansas City Star Co., Flambeau Paper Co. Division, respondent, has filed a motion for rehearing. For the reasons hereinafter set forth, Mr. Justice BEILFUSS, Mr. Justice HANLEY, and the writer would grant the motion for a rehearing.

The majority opinion correctly holds that "bona fide labor dispute," as the term is used in sec. 108.04(10), Stats., means a controversy regarding the terms of employment which in fact exists and is not merely pretextual or feigned on the part of an employer in an attempt to avoid his obligations under the Unemployment Compensation Act. However, the facts of this case clearly support the trial court's conclusion that these employees lost their employment as a result of a bona fide labor dispute.

Section 1(b) of the collective bargaining agreement provides:

> "(b) If either party shall desire to change any provision of this agreement, it shall give written notice of such desire to the other party at least sixty (60) days in advance of any anniversary date."

Both unions gave the requisite notice to the employer by letters on May 10 and May 12, 1971, that certain contract provisions should be renegotiated. Bargaining sessions were conducted on June 11, 1971, and intermittently thereafter for approximately six weeks. The unions sought increased wages and changes in fringe benefits such as pensions, vacations and group insurance. The employer sought changes in certain work rules, wage differentials and contract language.

The parties were unable to agree and a "bona fide labor dispute"[1] between the parties existed.

An impasse was reached between the parties on July 23rd. On July 27th, the union notified the employer that the members had agreed to strike by a vote of 291 to 19. Pursuant to section 2 of the collective bargaining agreement, and on August 5th, both unions tendered termination notices, effective in thirty days in accordance with their contracts. At the same time the unions advised the employer that they would be willing to meet to resolve differences any time during the thirty day period.

Because of the nature of the chemicals and machinery used by the employer in its operations, a sudden walkout by employees during full production would have caused extensive damage to facilities and materials. Therefore, the employer immediately began to wind down its opera-

1. See: sections 103.62, 111.02, 111.70 (1)(i), and 111.81 (8), Stats., for definitions of a labor dispute.

tions. Customers and material suppliers were notified and, naturally, a drastic decline in new orders for paper goods was soon evident.

On August 15th, the President of the United States asked for a 90-day wage and price freeze and four days later, on August 19th, the employer received the following letter from the unions:

> "In light of President Nixon's ninety day freeze on wages and prices, this letter will serve as a withdrawal of that termination notice and of our desire to continue to work under the terms of the existing agreement, *unless, or until, a new termination is sent* or full agreement reached on a new contract." (Emphasis supplied.)

Somehow the commission and the majority opinion of this court interpret this withdrawal of termination notice as the end of the labor dispute. The fact is, it was not. A "bona fide labor dispute" existed before the termination notice was served and continued to exist after the purported withdrawal and continued until a new collective bargaining agreement was finally entered into between the parties in December, 1971.

All that the August 5th letter from the unions purported to accomplish was to withdraw the strike notice for the ninety day wage freeze and until the unions sent a new thirty day termination notice in the event an agreement was not reached on a new contract.

The employer refused to accept this attempted withdrawal of termination notice by the unions because the collective bargaining agreements did not provide for such a withdrawal of the termination notice, and because it had already begun to wind down its operations and if full operations were resumed the unions could, at some impropi-

tious moment, issue a new notice of termination. Also, without what were believed to be adequate assurances that the employees would continue on the job, the employer could not serve its customers as a reliable source of supply. The commission, in support of its conclusion that the employees did not lose their employment because of a bona fide labor dispute, found that ". . . the good faith efforts by the unions to continue the contracts required the employer to accept the withdrawal notice even though the contract is silent as to the unions' right to withdraw the termination notices," notwithstanding other facts. This finding of fact by the commission, alone, is evidence of a labor dispute. Also, the commission held that ". . . the employer's actions in continuing to 'wind down' its business operations . . . were not required, necessary or warranted business decisions, . . ." and the attendant loss of work by these employees was ". . . solely because of economic worries over the preservation of its relations with its suppliers, and its customers (and that) this was a business judgment and did not constitute a 'bona fide labor dispute' as contemplated by section 108.04 (10)."

Undeniably, the decision to continue to wind down operations was a business judgment as, indeed, is every decision that an employer or a union makes with respect to its respective operations during a period such as this. However, an employer has the right, when confronted with a labor controversy, to evaluate his position in view of union demands and act in accordance with his best judgment without being penalized by enforcement of the provisions of the Unemployment Compensation Act. If, in fact, the actions of the employer or a union constitute an unfair labor practice, sanctions exist in a different forum. The commission is not empowered to weigh the merits of the various positions taken by the parties in a labor con-

troversy such as this. To do so violates the spirit and intent of sec. 108.04 (10), Stats. The purpose of this section ". . . is to preserve the *status quo* during the course of the labor dispute so that at its cessation the parties thereto stand in the same relation to each other as at its beginning in so far as payments of benefits under the act are concerned." *Marathon Electric Mfg. Corp.* v. *Industrial Comm.* (1955), 269 Wis. 394, 408, 69 N.W.2d 573, 70 N.W.2d 576. The commission itself recognized in *Marathon, supra,* p. 405, that the "'[p]resent law takes a "hands off" approach. *It stays neutral.* It does not require that the administrative agency determine the merits of the labor dispute. . . .'" The commission's ruling in this case violated this mandate of "neutrality" and, in effect, required the employer to contribute financial support to this labor dispute. If such a change is to be made in the law, it is the duty and concern of the legislature.

The two-member majority of the commission relied on *Barrett* v. *Wasson Coal Co.* (1949), 404 Ill. 11, 87 N.E.2d 769, as authority to support their conclusion. In *Barrett, supra,* p. 771, the operations of a coal mine ceased because the owner was losing money on it and the court held that the employees were not laid off because of a labor dispute, explaining as follows:

> ". . . There was not dispute concerning hours or terms of employment about which the parties were trying to agree. The trouble was the uncertainty of prices and conditions under the prevailing economic setup [government regulations] which caused the company to fear the future and to retire behind closed doors rather than to continue operation and take the chance of failure."

This paper plant was not closed because it was failing to generate a sufficient economic return or because of an uncertain market for its products.

A bona fide labor dispute *in fact* existed in this case both before and after the purported withdrawal of the termination notice. The dispute was not pretextual or feigned on the part of the employer.

We conclude as a matter of law that there was a bona fide labor dispute and would grant the motion for rehearing.

PERTINENT PROVISIONS OF WISCONSIN'S UNEMPLOYMENT RESERVES AND COMPENSATION ACT

108.02 *DEFINITIONS.* As used in this chapter:

(1) *Benefits.* "Benefits" means the money allowance payable to an employe as compensation for his wage losses due to unemployment as provided in this chapter.

* * *

(3) *Employe.* (a) "Employe" means any individual who is or has been performing services for an employing unit, in an employment, whether or not he is paid directly by such employing unit; except as provided in par. (b). If a contractor performing services for an employing unit is an employe under this subsection and not an employer subject to the contribution provisions of this chapter, a person employed by the contractor in fulfilment of his contract with the employing unit shall be considered the employe of the employing unit.

(b) Paragraph (a) shall not apply to an individual performing services for an employing unit if the employing unit satisfies the department as to both the following conditions:

1. That such individual has been and will continue to be free from the employing unit's control or

direction over the performance of his services both under his contract and in fact; and

2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

(c) This subsection shall be used in determining an employing unit's liability under the contribution provisions of this chapter, and shall likewise be used in determining the status of claimants under the benefit provisions of this chapter.

(d) Any individual who is, under this subsection, an "employe" of a given employing unit shall be deemed "employed" by that employing unit for the purposes of this chapter.

(4) *Employer.* (a) "Employer", except where the term by its context may apply to any unit employing one or more individuals, means any person, partnership, association, corporation, whether domestic or foreign (or legal representative or trustee in bankruptcy or receiver or trustee of a person, partnership, association or corporation, or legal representative of a deceased person), including this state and any city of the 1st class (but excluding any other political subdivision) and any fraternal benefit society as defined in s. 208.01, who is subject to this chapter under the statutes of 1969, or who has had employment in Wisconsin and becomes subject to this chapter under this subsection.

(b) Any other employer shall become an "employer" subject hereto as of the beginning of 1972 or any later calendar year if it:

1. Is a nonprofit organization; and

2. Employed as many as 4 individuals in employment for some portion of a day (whether or not at the same

moment of time) on at least 20 days, each day being in a different calendar week (whether or not such weeks were consecutive), ending either in that year or in the preceding calendar year.

(c) Any other employer shall become an "employer" subject hereto as of the beginning of 1972 or any later calendar year if he:

1. Paid wages for employment which totaled $1,500 or more during any calendar quarter in either that year or the preceding calendar year; or

2. Employed at least one individual in some employment in each of 20 or more calendar weeks ending in that year or in each of 20 or more calendar weeks ending in the preceding calendar year, whether or not the same individual was in employment in each such week.

(d) Any other employer who is subject to the federal unemployment tax act for any calendar year, or who, as a condition for approval of this chapter for full tax credit against the tax imposed by the federal unemployment tax act, is required, pursuant to such act, to be an employer under this chapter, shall be an employer subject hereto as of the beginning of such calendar year. This paragraph also applies to any employer described in s. 182.032.

(e) Any other employer, who succeeds to the business of any "employer" hereunder, shall thereby become an "employer" subject to this chapter, as provided in s. 108.16(8).

(f) Any employer, including any political subdivision of the state, not otherwise subject to this chapter, who files with the department his written election to become an "employer" subject hereto for not less than 3 calendar years, shall, with the written approval of such election by

the department, become an "employer" fully subject to this chapter, as of the date and under the conditions stated in such approved election. Any political subdivision may limit its election to one or more of its operating units.

1. The department may refuse to approve any such election by an employer other than a political subdivision, in the interests of the proper administration of this chapter. The department shall not approve any such election by a nonprofit organization unless the employer also elects reimbursement financing in accordance with s. 108.151 (2), and shall terminate such election hereunder if the election of reimbursement financing is terminated pursuant to s. 108.151 (3). Any election approved by the department shall be void, in case the electing party was himself "employed" in the same enterprise as the individuals to whom such election applied. The department may at any time by written notice to the employer terminate any election other than one by a political subdivision in the interests of proper administration of this chapter.

2. An electing employer may, after 3 such years, terminate his election and thereby cease to be an "employer" subject hereto, despite par. (g), at the close of any week which ends after the month in which he has filed a written notice to that effect with the department, provided he is not then subject to this chapter under par. (b), (c), (d), or (e).

(g) An employer shall cease to be subject to this chapter only upon department action terminating his coverage. The department may terminate an employer's coverage, on its own motion or on application by the employer, by mailing a notice of termination to the employer's last-known address. An employer's coverage may

be terminated whenever the employer ceased to exist, transferred his entire business to another individual or individuals, or would not otherwise be subject under pars. (b) to (d). If a termination of coverage is based on an employer's application, it shall be effective as of the close of the calendar quarter in which the application was filed. Otherwise, it shall be effective as of the date specified in the notice of termination.

(5) *Employment.* (a). "Employment", subject to the other provisions of this subsection means any service, including service in interstate commerce, performed by an individual for pay.

(b) The term "employment" shall include an individual's entire service (performed within, or partly within and partly outside, Wisconsin), if such service is "localized" in Wisconsin; and shall also include such service, if it is not "localized" in any state but is performed partly within Wisconsin, and if:

1. The base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in Wisconsin; or

2. The base of operations or place from which such service is directed or controlled is not in any state in which some part of such service is performed, but the individual's residence is in Wisconsin.

(c) An individual's entire service for an employer, whether performed partly within or entirely outside Wisconsin, shall be deemed "employment" subject to this chapter, provided both the following conditions exist:

1. Such service is deemed "employment" covered by this chapter pursuant to a reciprocal arrangement between the department and each agency administering the unemployment compensation law of a juris-

diction in which part of such service is performed; or no contributions are required with respect to any of such service under any other unemployment compensation law; and

2. The employer so elects with the department's approval and with written notice to the individual.

(d) An individual's entire service shall be deemed "localized" within a state, if such service is performed entirely within such state, or if such service is performed partly within and partly outside such state but the service performed outside such state is incidental to the individual's service within such state (for example, is temporary or transitory in nature or consists of isolated transactions).

(dm) The term "employment" shall include an individual's service, wherever performed within the United States, the Virgin Islands or Canada, if:

1. Such service is not covered under the unemployment compensation law of any other state, the Virgin Islands or Canada; and

2. The place from which the service is directed or controlled is in Wisconsin.

* * *

(dn) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or the Virgin Islands), in the employ of an American employer (other than service which is deemed "employment" under par. (b), (c) or (d) or the parallel provisions of another state's law), if:

1. The employers' principal place of business in the United States is located in Wisconsin; or

2. The employer has no place of business in the United States, but:

a. The employer is an individual who is a resident of Wisconsin; or

b. The employer is a corporation which is organized under the laws of Wisconsin; or

c. The employer is a partnership or a trust and the number of the partners or trustees who are residents of Wisconsin is greater than the number who are residents of any one other state; or

3. None of the criteria of subds. 1 and 2 is met but the employer has elected coverage in Wisconsin or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under this chapter.

(do) 1. An "American employer", for purposes of par. (dn), means a person who is:

a. An individual who is a resident of the United States; or

b. A partnership if two-thirds or more of the partners are residents of the United States; or

c. A trust, if all the trustees are residents of the United States; or

d. A corporation organized under the laws of the United States or of any state.

2. For the purposes of par. (dn), the term "United States" includes the states, the District of Columbia, and the commonwealth of Puerto Rico.

(e) In determining whether an individual's entire services shall be deemed "employment" subject to this chapter, under pars. (b), (c), (d), (dm) and (dn), the

department may determine and redetermine the individual's status hereunder for such reasonable periods as it deems advisable, and may refund (as paid by mistake) any contributions which have been paid hereunder with respect to services duly covered under any other unemployment compensation law.

(f) The term "*employment*", as applied to work for a governmental unit, except as such unit duly elects otherwise with the department's approval, *shall not include*:

1. Employment as an elected or appointed public officer;

2. Employment, of a professional or consulting nature, paid on a per diem or retainer basis;

3. Employment of an individual receiving work relief or work training as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof;

4. Employment, by an educational institution, other than an institution of higher education, supported wholly or substantially from public funds, of any person as a teacher in such institution;

5. Employment directly by the state fair during its active duration (including the week before and the week after the fair); or employment by the Wisconsin National Guard directly and solely in connection with its summer training camps or for emergencies; or employment directly by the department of natural resources for emergency fire fighting;

6. Employment by a governmental unit other than in a hospital or institution of higher education in a given week, for the removal of snow or ice or for

work connected with floods, of an individual who has worked for such governmental unit in 6 or less of the 52 weeks preceding the given week;

7. Service solely as a school crossing guard;

8. Part-time or occasional service in recreational activities;

9. Past service in a regular annual school-year position except in a hospital or institution of higher education (other than teaching) by an individual who still (when claiming benefits) has status therein as a school-year employe;

11. Part-time or occasional service or work by visually handicapped persons performed in the workshop for the blind.

* * *

(12) *Week.* "Week" means calendar week, starting Sunday and ending Saturday; but, where an employe starts a working shift on a given Saturday, all his hours and pay for that shift shall be counted in the calendar week which includes that Saturday.

* * *

(18) *Eligibility.* An employe shall be deemed "eligible" for benefits of any given week of his unemployment unless he is disqualified by a specific provision of this chapter from receiving benefits for such week of unemployment, and shall be deemed "ineligible" for any week to which such a disqualification applies.

* * *

(21) *Undefined Terms.* Any word or phrase used in this chapter and not specifically defined herein shall be interpreted in accordance with the common and approved

usage thereof and in accordance with other accepted rules of statutory construction. No legislative enactment shall control the meaning or interpretation of any such word or phrase, unless such enactment specifically refers to this chapter or is specifically referred to in this chapter.

• • •

108.03 *PAYMENT OF BENEFITS.* (1) Benefits shall be paid to each unemployed and eligible employee from his employer's account, under the conditions and in the amounts stated in (or approved by the department pursuant to) this chapter, and at such times, at such places, and in such manner as the department may from time to time approve or prescribe.

(2) The benefit liability of each employer's account shall begin to accrue under s. 108.06 in the first week completed on or after the first day of that calendar year within which his contributions first began to accrue under this chapter.

(3) When an employer, after due notice of a benefit claim against his account, has conceded liability thereunder or has failed to file the required report thereon or has failed to raise any eligibility issue thereunder, any benefits allowed under any resulting benefit determination shall be promptly paid; and any issue thereafter raised by the employer shall not affect benefits already paid.

108.04 *ELIGIBILITY FOR BENEFITS.*

• • •

(5) DISCHARGE FOR MISCONDUCT. An employe's eligibility, for benefits based on those credit weeks then accrued with respect to an employing unit, shall be barred for any week of unemployment completed after he has been *discharged* by the employing unit for *misconduct*

connected with his employment; provided, moreover, that such employe shall be deemed ineligible for benefits (from other previous employer accounts) for the week in which such discharge occurred and for the 3 next following weeks.

(6) DISCIPLINARY SUSPENSION. As to an employe's weeks of unemployment by reason of a disciplinary suspension by a given employer, the employe shall be ineligible for benefits as follows:

(a) If the suspension was for misconduct connected with his employment, he shall be ineligible from the given employer's account for each such week and ineligible from other previous employer accounts for the first 3 such weeks.

* * *

(b) If the suspension was for other good cause connected with his employment, he shall be ineligible for the first 3 such weeks.

* * *

(9) PROTECTION OF LABOR STANDARDS. Benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(b) If the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(c) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(10) LABOR DISPUTE. An employe who has left (or partially or totally lost) his employment with an employing unit because of a strike or other bona fide *labor dispute* shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed.

(10m) *Labor Dispute Progress.* If the active progress of such a strike or other bona fide labor dispute ends on a Sunday, it shall not be deemed under sub. (10) to be in active progress in the calendar week beginning on that Sunday as to any employe who did not normally work on Sundays in such establishment.

* * *

108.16 *UNEMPLOYMENT RESERVE FUND.*

(1) For the purpose of carrying out the provisions of this chapter there is established a fund to be known as the "Unemployment Reserve Fund", to be administered by the department without liability on the part of the state beyond the amount of the fund. This fund shall consist of all contributions and moneys paid into and received by the fund pursuant to this chapter and of properties and securities acquired by and through the use of moneys belonging to the fund.

(2) (a) A separate employer's account shall be maintained by the department as to each employer contributing to said fund.

(b) Each employer's account shall be credited with all his contributions paid into the fund, and shall be charged with all benefits duly paid from the fund to his employes based on their past employment by him, except as otherwise specified in this chapter.

(c) Any reference in this chapter to eligibility for, or to payment of, benefits 'from an employer's account", or any similar reference, shall mean benefits payable or paid from the fund based on past employment by the employer in question.

* * *

(d) The fund shall be mingled and undivided, and nothing in this chapter shall be construed to grant to any employer or employee any prior claim or right to any part of the fund.

(e) Benefits to be "charged" against a given employer's account shall be so charged as of the date shown by the check covering such benefits; and such check shall be promptly mailed and shall, in determining the experience or status of such account for contribution purposes, be deemed "paid" on said date.

* * *

108.18 *CONTRIBUTIONS TO THE FUND.*

(1) TOTAL RATE. (a) Each employer shall pay contributions to the fund for each calendar year at whatever rate on his payroll for that year duly applies to him pursuant to this section.

(b) An employer's contributions shall be credited to his account in the fund, but only after any solvency contribution paid or payable by him or deducted from his account under subs. (8) and (9) has been credited to the fund's balancing account (currently, as of the date when paid or deducted).

(2) INITIAL RATES. (a) An employer's contribution rate shall be 2.7% on his payroll for each of the first 3 calendar years with respect to which contributions are credited to his account, except as additional contributions apply under this section.

(b) As to each of those first 3 calendar years, if the employer's payroll for any such year was $20,000 or more, he shall be required to pay an additional contribution at the rate of 1.3 per cent on that calendar year's payroll, within 60 days after notice from the department that such additional contribution is payable, if his account:

1. At the close of that calendar year was overdrawn (on a cash basis, with the benefits paid and charged to the account exceeding the contributions paid and credited thereto, through said close of year); or

2. As of the next June 30 computation date was overdrawn (with a negative reserve percentage).

* * *

(8) SOLVENCY CONTRIBUTIONS. Each employer's solvency contribution for each period of a calendar year shall be figured by applying the solvency rate determined for that year under sub. (9) to his payroll for that period and shall be payable to the fund's balancing account by the due-date of his contribution report, as follows:

(a) If the employer's reserve percentage is zero or more or sub. (2) (a) applies to him, the department shall deduct his solvency contribution (figured at the solvency rate, on his relevant payroll) from his current contributions and/or (if necessary) from his account, except to the extent that he elects otherwise by paying some or all of his solvency contribution in addition to his other contributions by the due-date of his contribution report.

(b) If the employer's reserve percentage is less than zero and sub. (2) (a) does not apply to him, his solvency contribution (figured at the solvency rate, on his relevant payroll) shall, without limitation by sub. (5), be added to and payable with his other contributions.

(9) SOLVENCY RATES. (a) The solvency rate for 1965 shall be 0.25%.

(b) The solvency rate required for each subsequent calendar year shall depend on the extent to which the net balance of the fund's balancing account at the close of the preceding July falls short of the adequacy level then required, and shall be determined by the fund's treasurer pursuant to this subsection.

(c) The adequacy level required for the fund's balancing account shall be:

1. $15 million at the close of July 1965.

2. $18 million at the close of July 1966.

3. At the close of each subsequent July, the amount which equals 0.4% of the gross wages paid by all employers in the immediately preceding calendar year, as determined pursuant to par. (h).

(d) The fund's treasurer shall determine the net balance of the fund's balancing account, at the close of each July, after deducting the debit balances of any employer accounts then overdrawn and any positive balance of any government unit, and after crediting any benefit payments reimbursable by any government unit.

(e) He shall subtract that net balance from the relevant adequacy level required by par. (c), to determine the "deficiency amount" for the balancing account at the close of July.

(f) He shall then compare that deficiency amount with the aggregate payrolls (for the preceding calendar year) determined under par. (h), to figure the lowest multiple of one-tenth per cent which would, if applied to those payrolls, yield the "deficiency amount".

(g) The multiple of one-tenth per cent thus computed shall be the solvency rate for the calendar year which follows that close of July.

* * *

PERTINENT PROVISIONS OF NATIONAL LABOR RELATIONS ACT, AS AMENDED

Findings and Policies

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or mod-

ification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose

his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * *

EXCERPTS FROM PLEADINGS AND BRIEFS

Excerpt from Petitioner's Complaint in the Circuit Court of Dane County, Wisconsin:

24. "The decision, order or award of the Commission for and on behalf of the Department is contrary to and in violation of the Constitution of the United States for the following reasons and in the following respects:

(a) Such decision, order or award is subject to Wisconsin Statutes prohibiting the meaningful and effective review of the findings of fact which statutes violate Amendments V and XIV to the United States Constitution in that they deny plaintiff due process of law;

(b) Such decision, order or award is based upon Wisconsin Statutes requiring or allowing the Department to determine whether or not a "bona fide labor dispute" existed between plaintiff and Unions which statutes violate Article VI of and Amendments V and XIV to the United States Constitution in that such statutes violate and are contrary to federal labor laws which preempt and supersede all state or local laws regulating the conduct of employees, employers and representatives of employees,

(c) Such decision, order or award violates and is contrary to Article VI of the United States Constitution in that such decision, order or award is contrary to federal labor laws which preempt and supersede all state or local laws regulating the conduct of employees, employers and representatives of employees;

(d) Such decision, order or award is based upon findings of fact and other determinations which are beyond the statutory power or authority of the Department and, therefore, said decision, order or award is in violation of and contrary to Amendments V and XIV to the United States Constitution in that it is an arbitrary and unlawful exercise of power by a tribunal which is incompetent to exercise such power or authority;

(e) Such decision, order or award is contrary to and in violation of Article I, §10 of the United States Constitution in that it impairs the obligations of the parties under the Labor Agreement to resolve questions and disputes as to interpretation of the Labor Agreement by processes and methods set forth in the Labor Agreement;

(f) Such decision, order or award is contrary to and in violation of Amendments V and XIV to United States Constitution in that it compels plaintiff to support the Unions economically and financially in a labor dispute between plaintiff and Unions in which plaintiff was exercising rights guaranteed to it by law and contract;

(g) Such decision, order or award is contrary to and in violation of Article I, §10, Article VI of and Amendments V and XIV to the United States Constitution.

25. For the reasons and in the respects stated in paragraph 24 herein, the decision, order or award of the Commission for and on behalf of the Department violated the due process clause and comparable provisions of the Constitution of the State of Wisconsin."

Excerpt from Petitioner's Principal Brief in the Circuit Court of Dane County, Wisconsin:

"The Department's decision is contrary to the Constitution of the United States and the State of Wisconsin because the decision exceeds the agency's statutory jurisdictional power. Thus, the Department by awarding unemployment compensation to Claimants who lost their employment due to a bona fide labor dispute usurped the legislative function and wholly disregarded the legislative restriction on its power. In addition, the Department made findings of fact as to the reasonableness of the Employer's conduct and the rights of the parties pursuant to the Agreement which findings were not within the purpose of competency of the Department. By acting beyond its power the Department deprived the Employer of its right to due process by a competent tribunal."

Excerpt from the Brief of Amicus Curiae (Wisconsin Manufacturer's Association) in the Circuit Court of Dane County, Wisconsin:

"The Commission in its decision has concluded that a Union's offer in a negotiation setting must be unconditionally accepted by the Employer if the Union made the offer in a 'good faith effort'. This is not only weaving a totally revolutionary concept into the fabric of what now constitutes collective bargaining, it defies the realities of the practical world about us.

Here the parties were at impasse,[1] the employees had voted 15 to 1 to strike[2] and the Unions had given notice to terminate the contracts on September 4, 1971.[3]

In this posture, it has been the federal and state policy for at least 35 years that the parties are left to the employment of every non-violent weapon in their economic arsenal to bring pressure to resolve the conflicts between their economic interests. Employees in their collective group may concertedly strike or threaten to strike. Employers may lock out. *American Ship Building Co.* v. *NLRB,* 85 S.Ct. 955, 380 U.S. 300 (1965); *U. S. Sugar Corp.,* 1968-1 CCH NLRB ¶22,028; 169 NLRB No. 4 (1968). If employees strike, the employer may keep his plant going with supervisors and permanently replace strikers. *NLRB* v. *Mackay Radio & Tel. Co.,* 58 S.Ct. 904, 304 U.S. 333 (1938).

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1. An impasse results when, after bargaining in good faith by both parties on the mandatory subjects of bargaining; there is no realistic possibility that continuation of discussion at that time would be fruitful because of the firmness of position and disparity and divergence of positions. *Television and Radio Artists* v. *NLRB,* 395 F(2d) 622 (CADC, 1968). That the parties continue to negotiate on issues other than that causing the impasse is not incompatible with a finding of impasse. *Teamsters Local 745* v. *NLRB,* 355 F(2d) 842 (CADC, 1966).

2. Which is a requirement under Wisconsin law. See, §111.06(2)(e), Wis. Stats. See also, *Hotel & Restaurant Employees* v. *WERC,* 235 Wis. 329 (1940), aff'd, 62 S.Ct. 706, 314 U.S. 571 (1942); *UAW* v. *WERB,* 69 S.Ct. 516, 336 U.S. 245 (1949); *Amalgamated Local No. 806* v. *WERB,* 250 Wis. 570 (1947).

3. Only by termination notice could the Union avoid the consequences of striking in the face of an effective (by extension) no-strike clause. See e.g., §301, 61 Stat. 156; 29 USCA §185 (suits for damages see, *Signal Stat. Corp.* v. *Local 475, UE.,* 235 F(2d) 298 (CA-1, 1956), *cert. den.,* 77 S.Ct. 1293, 354 U.S. 911; *Yale & Towne Mfg. Co.* v. *Lodge 1717, IAM,* 299 F(2d) 882 (CA-3, 1962)), (injunction, see *Boys Markets Inc.* v. *Retail Clerks' Union,* 90 S.Ct. 1583, 398 U.S. 235 (1970), (empioyees discharged or disciplined for cause, see, e.g., *McGraw Edison Co.,* 62-3 Arb. ¶8775; *Insurlock Co.,* 62-3 ARB. ¶8838; *Ford Motor Co.,* 64-1 ARB. ¶8128)).

After impasse and during strike, the employer can put into effect his last wage offer, *NLRB* v. *Crompton-Highland Mills, Inc.*, 69 S.Ct. 960, 337 U.S. 217 (1949) or communicate directly with strikers to see if they would return to work at the previously rejected offer. *NLRB* v. *Penokee Veneer Co.*, 168 F(2d) 868 (CA-7, 1948).

In other words, the federal labor relations policy is:

> '. . . . not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. . . But it was recognized from the beginning that agreement might in some cases be impossible and it was never intended that the government would in such cases step in, become a party to the negotiations *and impose* its own view of a desirable settlement.' *H. K. Porter Co.* v. *NLRB*, 905 S.Ct. 821, 823, 397 U.S. 99, 103 (1970).

This recent declaration of the Supreme Court, reaffirmed principles previously enunciated in *NLRB* v. *American National Ins. Co.*, 72 S.Ct. 824, 829; 343 U.S. 395, 404 (1952); *NLRB* v. *Insurance Agents Inter. Union*, 80 S.Ct. 419, 426; 361 U.S. 477, 487 (1960); *NLRB* v. *Jones & Laughlin Steel Corp.*, 57 S.Ct. 615, 628; 301 U.S. 1, 45 (1937).

The Wisconsin legislative policy has coincided with the federal law in this regard. The preamble to the Wisconsin Employment Peace Act in this regard recites:

> '(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of

such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing . . .' §111.01(3), Wis. Stats.

Accordingly, under neither federal nor state law is the government or one of its agencies entitled to pass on the merits of the positions, postures, arguments or proposals of a party to a labor dispute.[4]

The Commission, in the decision under review, commits the crime of entering the negotiations twice: it declared by fiat that the employer was *required* to allow the Union to withdraw its termination notice *without condition or consequence* and that the Company took actions to continue to wind down which were 'not required, necessary or warranted business decisions on the part of the employer'. As we have seen, since the employer has an absolute right to lock out in a labor dispute (as one of its main weapons in its economic arsenal), the employer is not making an unwarranted 'business decision', he is making a 'labor dispute decision'; he is determining that he will not continue to operate upon the threat of being closed upon a moment's notice; he is determining that he will exert economic pressure in the labor dispute in an attempt to bring settlement or, at least, a guaranteed period of truce. This is a decision which cannot be isolated and referred to in a vacuum unrelated to the labor dispute. By sophistry, the Commission cannot (although it has tried) label it a 'business decision' and thereby unrelated to the labor dispute."

4. Wisconsin's single attempt to provide governmental dictation of employment was held unconstitutional. *Amalgamated Association* v. *WERB*, 71 S.Ct. 359, 340 U.S. 383 (1951).

Excerpt from Petitioner's Principal Brief As Respondent in the Wisconsin Supreme Court:

"The Department's decision is contrary to the Constitutions of the United States and the State of Wisconsin because the decision exceeds the agency's statutory jurisdictional power. Thus, the Department by awarding unemployment compensation to Claimants who lost their employment due to a bona fide labor dispute usurped the legislative function and wholly disregarded the legislative restriction on its power. In addition; the Department made findings of fact as to the reasonableness of Respondent's conduct and the rights of the parties pursuant to the agreement which findings were not within the purpose or competency of the Department. By acting beyond its power the Department deprived Respondent of its right to due process by a competent tribunal and the Circuit Court remedied this abuse of power."

Excerpt from Brief of Amicus Curiae (Wisconsin Manufacturer's Association) in Wisconsin Supreme Court:

"No better statement of policy can be found on why the Court's decision should be sustained than the statement of the Industrial Commission quoted at length in *Marathon Electric Mfg. Corp.*, 269 Wis. 394 (1954). This statement was also the basis of the trial court's decision (A-Ap. pp. 119-120). The salient portion of this Court's statement noted that:

'Since the enactment of the first Unemployment Compensation Law in 1931, the law has contained a provision suspending eligibility of workers unemployed because of a strike or a bona fide labor dispute. *The labor-dispute provision constitutes a*

'neutrality act' which the legislature inserted into the act.' (Emphasis supplied.) 269 Wis. at 405.

By passing judgment on the merits of the dispute, the Commission violated this UC 'neutrality act'. Appellants now seek to reverse the Circuit Court's sustaining of that 'neutrality act'.

In their contentions, Appellants ask this Court not only to reverse the legislative neutrality mandate noted by this Court in *Marathon Electric, supra,* but also to weave a revolutionary concept into the fabric of collective bargaining as it exists today.

Here, the parties were at impasse,[2] the employees had voted fifteen to one to strike[3] and the Unions had given notice to terminate the contracts on September 4, 1971.[4]

In this posture, it has been the federal and state policy for at least 35 years that the parties are left to

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2. An impasse results when, after bargaining in good faith by both parties on the mandatory subjects of bargaining; there is no realistic possibility that continuation of discussion at that time would be fruitful because of the firmness of position and disparity and divergence of positions. *Television and Radio Artists* v. *NLRB,* 395 F(2d) 622 (CADC, 1968). That the parties continue to negotiate on issues other than that causing the impasse is not incompatible with a finding of impasse. *Teamsters Local 745* v. *NLRB,* 355 F(2d) 842 (CADC, 1966).

3. Which is a requirement under Wisconsin law. See, §111.06(2)(e), Wis. Stats. See also, *Hotel & Restaurant Employees* v. *WERC,* 236 Wis. 329 (1940), aff'd, 62 S.Ct. 706, 315 U.S. 437 (1942); *UAW* v. *WERB,* 69 S.Ct. 516, 336 U.S. 245 (1949).

4. Only by termination notice could the Union here avoid the consequences of striking in the face of an effective (by extension) no-strike clause. See e.g., §301, 61 Stat. 156; 29 USCA §185 (suits for damages see, *Signal Stat. Corp.* v. *Local 475, UE.,* 235 F(2d) 298 (CA-2, 1956), *cert. den.,* 77 S.Ct. 1293, 354 U.S. 911; *Yale & Towne Mfg. Co.* v. *Lodge 1717, IAM,* 299 F(2d) 882 (CA-3, 1962)), (injunction, see, *Boys Markets Inc.* v. *Retail Clerk's Union,* 90 S.Ct. 1583, 398 U.S. 235 (1970)), (employees discharged or disciplined for cause, see, e.g. *McGraw Edison Co.,* 62-3 Arb. ¶8775; *Insulrock Co.,* 62-3 Arb. ¶8838; *Ford Motor Co.,* 64-1 Arb. ¶8128)).

the employment of every non-violent weapon in their economic arsenal to bring pressure to resolve the conflicts between their economic interests. Employees in their collective group may concertedly strike or threaten to strike. Employers may lock out. *American Ship Building Co.* v. *NLRB*, 85 S.Ct. 955, 380 U.S. 300 (1965); *U.S. Sugar Corp.*, 169 NLRB No. 4 (1968). If employees strike, the employer may keep his plant going with supervisor and, in the absence of pervasive unfair labor practices, permanently replace strikers. *NLRB* v. *Mackay Radio & Tel. Co.*, 58 S.Ct. 904, 304 U.S. 333 (1938).

After impasse and during strike, the employer can put into effect his last wage offer, *NLRB* v. *Crompton-Highland Mills, Inc.*, 69 S.Ct. 960, 337 U.S. 217 (1949) or communicate directly with strikers to see if they would return to work at the previously rejected offer. *NLRB* v. *Penokee Co.*, 168 F(2d) 868 (CA-7, 1948).

In other words, the federal labor relations policy is:

> '. . . not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. . . But it was recognized from the beginning that agreement might in some cases be impossible and it was never intended that the government would in such cases step in, become a party to the negotiations *and impose its own views* of a desirable settlement.' (Emphasis supplied.)

H. K. Porter Co. v. *NLRB*, 90 S.Ct. 821, 823, 397 U.S. 99, 103 (1970). This recent declaration of the Supreme Court, reaffirmed principles previously enunciated in *NLRB* v. *American National Ins. Co.*, 72 S.Ct. 824, 829;

343 U.S. 395, 404 (1952); *NLRB* v. *Insurance Agents Inter. Union*, 80 S.Ct. 419, 426; 361 U.S. 477, 487 (1960); *NLRB* v. *Jones & Laughlin Steel Corp.*, 57 S.Ct. 615, 628; 301 U.S. 1, 45 (1937).

The Wisconsin legislative policy has mirrored the federal law in this regard. The preamble to the Wisconsin Employment Peace Act in this regard recites:

> '(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing. . . .' §111.01(3), Wis. Stats.

Accordingly, under neither federal nor state law is the government or one of its agencies entitled to pass on the merits of the positions, postures, arguments or proposals of a party to a labor dispute.[5]

By their appeal, Appellants seek to inject the state into the negotiations twice: first in declaring that the employer was *required* to allow the Union to withdraw its termination notice *without condition or consequence* and, second, in deciding that the Company's actions to continue to wind down were 'not required, necessary or warranted business decisions on the part of the employer'. As we have seen, since an employer has an absolute right to lock out in a labor dispute (as one of the main weapons in his economic arsenal), the employer is not making an unwarranted 'business decision'; he is making a 'labor dispute decision'; he is determining that he will not continue to operate upon

5. Wisconsin's single attempt to provide governmental dictation of employment was held unconstitutional. *Amalgamated Association* v. *WERB*, 71 S.Ct. 359, 340 U.S. 383 (1951).

the threat of being closed upon a moment's notice; he is determining that he will exert economic pressure in the labor dispute in an attempt to bring settlement or, at least, a guaranteed period of truce. This is a decision which cannot be isolated and referred to in a vacuum unrelated to the labor dispute. By sophistry, Appellants cannot (although they have tried) label it a 'business decision' and thereby unrelated to the labor dispute."

Excerpt from Petitioner's Brief in Support of Motion for Rehearing in the Wisconsin Supreme Court:

"As the Court realizes, there exists a body of general federal labor law fashioned by the federal courts in conjunction with the principles of the National Labor Relations Act. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 450-451 (1957). The principles of this body of law are designed to favor free and open collective bargaining in order to prevent the frustrations resulting from the outside regulation of negotiations which lead to labor strife. The opinions of the Department and the Court violate this supreme law of the land by interjecting the Department into the collective bargaining process as an arbiter of which side is more reasonable and should, therefore, prevail. As a result of this ruling, both labor and management will now be restricted in negotiations. Neither party will want to pursue interests which may be objectionable to the Department even though such conduct and interests are protected and encouraged by federal law. Instead of promoting labor peace and the resolution of contract issues in forums selected by the parties, the decision here subjects the parties to outside and unsought control—a clear violation of the federal labor policy."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-73

THE KANSAS CITY STAR COMPANY, FLAMBEAU PAPER COMPANY DIVISION,
Petitioner,

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and WILLIAM A. ABEL, et al.,
Respondents.

BRIEF

Of William A. Abel and All Others Similarly Situated In Opposition to Writ of Certiorari

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In the Supreme Court of the United States

October Term, 1974

No. . . . . .

The Kansas City Star Company, Flambeau Paper Company Division,
Petitioner,

vs.

Department of Industry, Labor and Human Relations and William A. Abel, George J. Bablick, Kenneth L. Balczewski, Frank T. Baroka, James A. Baroka, Melvin K. Behreandt, Donald N. Black, Orvil G. Black, Eugene L. Boland, Charles M. Bolz, Callis H. Borne, Earl E. Borowski, Dennis D. Bourgard, Lester R. Bourgard, Robert J. Bradle, Anton D. Braunreiter, Joseph A. Brimstein, Dolores H. Bruns, James E. Burbey, Miles T. Christianson, Gary A. Cooley, Richard C. Cooley, Arthur C. Dane, Walter W. Dillon, Ervin H. Engel, Larry R. Erickson, Darrell G. Falstad, Vernon L. Falstad, James J. Fenzl, Lawrence P. Fenzl, A. H. Fleischfresser, Donald E. Franke, Louis A. Franke, Raymond J. Frankiewicz, William G. Gierman, Edward L. Gruber, Leonard W. Gruber, Charles A. Gustafson, Patricia A. Hammond, Edward R. Hanson, Robert A. Hanson, Robert K. Hein, Tom E. Heisler, Alfred E. Herbst, Arthur J. Herbst, Clarence E. Herbst, Delmar J. Herbst, Donald A. Herbst, James E. Herbst, Robert K. Herbst, Stephen A. Herbst, Bernard J. Hilgart, Edwin S. Hilgart, Elmer C. Hilgart, Michael R. Hilgart, Lawrence J. Hilgart, Patrick J. Hilgart, Richard T. Hilgart, Ronald W. Hilgart, Thomas W. Hilgart, Vernon L. Hilgart, Frank J. Hirtreiter, Frederick Hirtreiter, Carlin

J. Hoffman, William J. Hoffman, Durwood L. Hogue, Ronald D. Hogue, Travis R. Hosey, James R. Hoth, Michael J. Hughes, Charles A. Jaglinski, Nicholas C. Jarosinski, Lawrence J. Johnson, Harold E. Johnston, Kenneth G. Keily, Sylvius G. Kelnhofer, John M. Kinnear, Warren A. Kirsten, Gary L. Knotts, Otto L. Koenig, Louis F. Koller, James L. Koshak, Bernie F. Kotke, George L. Kozak, Jr., James A. Kronberger, Raymond J. Kronberger, Theodore L. Kronberger, Thomas J. Kronberger, William F. Kronberger, Bernice Y. Kundinger, Eugene A. Kundinger, James A. Kundinger, Caroline D. Kuse, Anna M. La Mere, Gene E. Lannigan, Frank J. Lapp, Frederick M. Lenzen, Richard J. Little, Edward J. Lizak, William J. Lucas, Thomas L. Mader, Elmer J. Martin, Byron F. McCorison, John H. McCue, Ronald G. Meyer, Arnold M. Michalski, George F. Michalski, Glenn L. Morgan, Herbert D. Morgan, Donald E. Murphy, Erland V. Nessman, Joseph R. Niebauer, Ronald W. Niebauer, Richard W. Northrop, Theodore J. Obernberger, Clayton R. Olson, Richard C. Olson, Frank J. Oswald, Dale L. Packard, Vernon E. Palacheck, Frank C. Palecek, Gust L. Palecek, Monte J. Passer, Edward H. Peterson, Larry J. Peterson, Reginald E. Peterson, Leon E. Podrez, Thomas J. Pohle, Richard F. Preissner, Isabel Pritzl, James J. Pritzl, Alvan W. Radlinger, Jr., John J. Radlinger, Joseph G. Radlinger, Mike R. Radlinger, Emeron O. Reas, Raymond R. Rominske, Paul A. Rose, Jr., Glen D. Scherwinski, Howard E. Scherwinski, Jerome E. Scherwinski, Henry P. Schmidt, Richard J. Schmidt, George W. Schneider, Ronald J. Schoch, Herbert H. Schultz, Jr., Robert L. Schultz, Joseph A. Seidl, John D. Severt, Raymond M. Skawinski, Gerlad R. Slack, William F. Slack, Sr., James W. Smetak, Thomas A. Smith, Verna I. Steiner, Harlan J. Stull, Hershal H. Sturm, Robert E. Sutherland, Jerome P. Szymik, Roger M. Szymik, James A. Thibedeau, Neil W. Thibedeau, Anthony C. Thier, Jerome A. Thier, George W. Thoms, Elaine J. Toney, David A. Treml, George A. Treml, Law-

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner petitioned for Writ of Certiorari to review judgment and opinion of the Supreme Court of Wisconsin. The brief herein is filed on behalf of William A. Abel and all parties designated as respondents by petitioner other than the Department of Industry, Labor and Human Relations.

JURISDICTIONAL QUESTION

The petitioner contends that there is jurisdiction in this court pursuant to 28 USC Sections 1257(3) and 2101(c) Respondents contend that there is no federal question under the aforesaid laws.

STATUTE INVOLVED

Wisconsin Unemployment Reserves and Compensation Act, as amended, Chapter 108, Wis. R. Stats. (App. pp. A72-A87) Section 108.04(10) thereof which provides:

> "Labor Dispute. An employee who has left (or partially or totally lost) his employment with the employing unit because of a strike or other bona fide labor dispute shall not be eligible for benefit from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

STATEMENT OF THE CASE

Essentially the facts are as stated by the Petitioner. On page 9 of Petitioner's brief, however, there is the statement,

> "As a result union members engaged in a labor dispute over their terms and conditions of employment with Petitioner were paid unemployment compensations."

The findings of the Department of Industry, Labor and Human Relations of Wisconsin and of the Supreme Court of Wisconsin were that there was no bona fide labor dispute and that was dispositive of the question. (App. pp. A11, A63)

ARGUMENTS IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

I. There Is No Federal Question

Petitioner throughout its petition has presented as an unequivocal fact that there was a labor dispute and, therefore, unemployment compensation was allowed to employees who were "temporarily unemployed due to a labor dispute over the terms and conditions of employment". This was, therefore, given as reason to analogize this case with a number of cases cited for the proposition that the United States Supreme Court considers as an open question whether a state by law can permit payment of unemployment compensation or welfare funds to employees involved in a labor dispute. The analogy is inapposite. The cases cited by Petitioner[1] generally involved situations where the State law permitted payments to those unemployed because of a labor dispute thus putting in issue the neutrality of the State in a labor dispute. The Wisconsin State law denied benefits to such individuals, thus insuring the neutrality of the State.

Another case cited as analogous, *Nash v. Florida Industrial Commission*, 389 US 235 (1967) denied an applicant unemployment compensation because he had filed an unfair labor practice charge with the National Labor Relations Board. Obviously on its face there was a clear and unequivocal impingement of a federal right; therefore, there was a federal question involved. In the instant case there is no federal right denied the Petitioner. There is no federal question involved in any way herein. This is plainly a decision on a State question and was decided on independent State grounds, to-wit, was there a labor

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[1] *Super Tire Engineering Co. v. McCorkle*, — US —, 40 L. Ed. 2d 1, 94 S. Ct. — (1974) and others in Petition for Writ, footnote, page 10.

dispute within the meaning of the State statute. Therefore, the U.S. Supreme Court will not take jurisdiction. *Dickson v. Duffy*, 342 US 33 (1951).

Involved herein was a pure question of fact-finding by the adjudicating body of first resort, the Department of Industry, Labor & Human Relations of Wisconsin. Examination of the statute shows that it sets forth certain factual elements that must be found before an unemployed person can be denied unemployment compensation, one of those being that there is a bona fide labor dispute. The existence of that fact must be determined in some way by a responsible fact finder. In effect, Petitioner would tie the hands of the Department, at least in the present case, to the proposition that it is bound by the unilateral declaration by the employer-petitioner that said employer considers that there was a bona fide labor dispute present. It is obvious that the practical effect of such an interpretation of law would deprive the Department of any power in any case to make this very necessary finding and in effect nullify it as the administrator of the law in at least that case where an employer wished to rely upon the issue of the labor dispute to deny benefits. In no instance then could any employee have this very vital issue of fact decided. This then is an issue of fact under State statute and judgment was based upon adequate independent State grounds. *Murdock v. Mayor of Memphis*, 87 US 429 (1874); *Waters-Pierce Oil Co. v. Texas*, 212 US 86 (1909).

II. The United States Supreme Court Will Not Substitute Its Findings of Fact for That of the State Court.

> "The Supreme Court does no ordinarily sit to decide questions of fact." *Handbook of the Law of Federal Courts*, Charles Alen Wright, p. 431 (1963).

Petitioner would call upon the Court to substitute its fact-finding for that of the State Court.

It is the long established principle that the Supreme Court in an action at law at least will not assert jurisdiction to review the decision of the highest court of the State, upon a mere question of fact, although a federal question would or would not be presented, according to the way in which a question of fact was decided. *Waters-Pierce Oil Co. v. Texas*, 212 US 86 (1909); *King v. West Virginia*, 216 US 92 (1910). As stated in *Wolfe v. North Carolina*, 364 US 177, 195 (1960), where appeal of a criminal conviction in a State court was denied:

> "[W]hen as here there can be no pretense that the (state) Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." (Citing *Nickel v. Cole*, 256 US 222, 225, 65 L. Ed. 900, 905, 41 S. Ct. 467).
>
> * * *
>
> "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." (citing *Watts v. Indiana*, 338 US 49, 50, 93 L. Ed. 1801, 1804, 69 S. Ct. 1347, 1357).

No more here than in *Wolfe* can one find any intent to evade a constitutional right of the Petitioner.

III. The Controversy Is Moot.

Petitioner gives recognition to the question of mootness as grounds for this Court refusing certiorari (Brief, p. 11). Judicial notice was taken of the fact in both the lower court decision and the Wisconsin Supreme Court decision that the Employer and Unions agreed on the terms of the new agreement on December 11, 1971 while the issue of the payment of un-

employment compensation benefits was still before the Department of Industry, Labor & Human Relations of the State of Wisconsin. (App. pp. A32, A53) Petitioner cites *Super Tire Engineering Co. v. McCorkle*, — US —, 40 L. Ed. 2d 1, 94 S. Ct. — (1974) as a case in which this Court recognized a federal question might be involved because of state economic support to strikers through payments of benefits through either welfare or unemployment compensation. The Court therein recognized that the issue may or may not be moot depending upon the potential for repetition of the State action. The Court stated at 40 L. Ed. 2d 8:

> ". . . we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here 'capable of repetition, yet evading review', so that petitioners are adversely affected by government 'without a chance of redress'."

The Court then considered *Oil Workers Unions v. Missouri*, 361 US 363 (1960) and *Harris v. Battle*, 348 US 803 (1950). The distinction drawn for those two cases in finding mootness is appropriate for the instant case. In the instant case there is not the element of automatic utilization of unemployment compensation by the employees in every instance involving a possible labor dispute by provision of State law. The Wisconsin State law declares that any bona fide labor dispute disqualifies employees from unemployment compensation. The fact of whether there would be unemployment compensation paid would depend upon the varying decision of the determinative agency as to the presence of a labor dispute. In those cases where there was found to be a labor dispute, payment of unemployment compensation benefits would be barred. The decision in the instant case, whether right or wrong. is unique to this case and its facts and does not set any precedent for any future bona fide labor disputes involving this employer or any other employer. *Super Tire Engineering Co.*, 40 L. Ed. 2d 9 states the test for mootness as follows:

> "As in *Harris and Oil Workers*, the strike here was settled before the litigation reached this Court. But, unlike those cases the challenged governmental action has not ceased. The New Jersey governmental action rests not on the distant contingencies of another strike and the discretionary act of an official. Rather New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent on executive discretion."

That is wholly unlike the situation in the instant case where the policy to pay such benefits is not fixed and definite, but is contingent upon administrative discretion to find the fact whether there is or is not a labor dispute.

CONCLUSION

Because there is no federal question, the Court will not engage in fact-finding where the State Court has already found the facts and the issue is moot, the respondent employees respectfully pray the Court to deny granting the petition for writ of certiorari.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-73

THE KANSAS CITY STAR COMPANY,
FLAMBEAU PAPER COMPANY DIVISION,
Petitioner,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF OF RESPONDENT, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, IN OPPOSITION

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IN THE

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THE KANSAS CITY STAR COMPANY,
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Petitioner,

v.

DEPARTMENT OF INDUSTRY, LABOR AND
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF OF RESPONDENT, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, IN OPPOSITION

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported as *Kansas City Star Co. v. ILHR Department* (1973), 60 Wis. 2d 591, 211 N.W. 2d 488 (Pet. App. 50-64). Its opinion denying a motion for rehearing is reported at 62 Wis. 2d 783, 217 N.W. 2d 66 (Pet. App. 65-72).

JURISDICTION

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. §1257(3) and §2101(c). This Court, however, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court herein because that court decided no federal question.

QUESTION PRESENTED

No federal question is properly presented by the petition herein. The "Question Presented For Review" as set forth in the petition was neither properly presented to nor decided by the Wisconsin Supreme Court, which decided only questions of state law.

STATEMENT OF THE CASE

The petitioner, hereinafter referred to as the employer, operates a paper mill in Park Falls, Wisconsin. It employed approximately 380 production workers at its mill. Most of these employes were members of one of two labor unions and such employes are respondents herein. The two unions had bargained jointly with the employer for over 30 years and on August 1, 1969, they had a two-year labor contract. This contract was in effect from August 1, 1969, through July 31, 1971, "and from year to year thereafter, unless terminated" in accordance with other contract provisions.

Beginning in May, 1971, there was a complicated series of events involving labor and management, which events are described in detail in the opinion of the Wisconsin Supreme Court (Pet. App. 50-55). These events culminated in September, 1971, in the closing of the mill and the layoff of the employes.

Thereafter the employes applied to the respondent Wisconsin Department of Industry, Labor and Human Relations, hereinafter called the department, for state unemployment compensation benefits. The employer contested the eligibility of the employes for such benefits on the ground that they were ineligible for them under the provisions of sec. 108.04(10), Wis. Stats., which provides:

> "LABOR DISPUTE. An employe who has left (or partially or totally lost) his employment with an employing unit because of a strike or other *bona fide labor dispute* shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other *bona fide labor dispute is in active progress in the establishment* in which he is or was employed." (Emphasis added.)

After a contested administrative hearing, the department found that the employes were eligible for state unemployment compensation benefits, since, although they had lost their employment, they had not lost such employment because of a bona fide labor dispute in active progress in the establishment within the meaning of sec. 108.04(10), Wis. Stats. (Pet. App. 11.)

The employer sought judicial review of this decision in the Circuit Court of Dane County, Wisconsin. That court reversed the decision of the department on the basis of its interpretation of sec. 108.04(10), Wis. Stats. (Pet. App. 50.) The Circuit Court decided only questions of state law.

The department and the employes, then, appealed from the judgment of the Circuit Court to the Wisconsin Supreme Court. The dispositive issues in the Wisconsin Supreme Court are described in the opinion of that court as:

"1. What is the meaning of a bona fide labor dispute as set forth in sec. 108.04(10), Stats.?

"2. Does the evidence support the findings by the Department that the employees did not lose their employment because of a bona fide labor dispute in active progress in the establishment in which they were employed?" (Pet. App. 59.)

The Wisconsin Supreme Court defined a "bona fide labor dispute" within the meaning of sec. 108.04(10), Wis. Stats., and determined that the evidence supported the finding of the department that the employes did not lose their employment because of a bona fide labor dispute in active progress in the establishment in which they were employed (Pet. App. 59-63). It, therefore, unanimously reversed the judgment of the lower court (Pet. App. 63). Subsequently it denied the employer's motion for rehearing, although three members of the court dissented to such denial (Pet. App. 65-72).

The employer has now petitioned this Court for a writ of certiorari to review the judgment of the Wisconsin Supreme Court. This Court, however, has no jurisdiction to conduct such a review and, therefore, the petition must be denied.

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court.

A. No federal question was decided by the Wisconsin Supreme Court.

As revealed by the opinions of the Wisconsin Supreme Court, and acknowledged by the employer (Pet. 9), the Wisconsin Supreme Court herein did not decide any federal

question (Pet. App. 50-72). It exclusively defined a "bona fide labor dispute" within the meaning of sec. 108.04(10), Wis. Stats., and determined that the evidence presented at the administrative hearing supported the department's determination that the employes were not ineligible for state unemployment compensation benefits because of the content of that subsection of the Wisconsin Statutes.

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257(3). Such jurisdiction exists *only* when a federal question has been properly presented to and decided by the highest court of the state and its decision of the federal question was necessary in its determination of the cause. In *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183, this Court wrote:

> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v New York, 293 US 52.***' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction is *Cardinale v. Louisiana* (1969), 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398. This Court, in dismissing the writ, wrote (394 U.S. 437, 438):

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the

sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with *no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'* 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)

See also the still more recent cases of *Hill v. California* (1971), 401 U.S. 797, 805, 806, 91 S. Ct. 1106, 28 L.Ed. 2d 484, 490, 491; *Monks v. New Jersey* (1970), 398 U.S. 71, 90 S.Ct. 1563, 26 L. Ed. 2d 54; and *DeBacker v. Brainard* (1969), 396 U.S. 28, 90 S. Ct. 163, 24 L. Ed. 2d 148.

The employer's "Question Presented For Review" (Pet. 5) is a mere argumentive question based on its evaluation of

the *result* of the decision of the Wisconsin Supreme Court on questions of state law. It is not a question which was either presented to or decided by that court. The assertion in the question that Wisconsin provides "economic support of union members who are unemployed because of a labor dispute" (Pet. 5) is untrue. Section 108.04(10), Wis. Stats., quoted *supra*, so demonstrates.

Even if the Wisconsin Supreme Court erroneously interpreted sec. 108.04(10), Wis. Stats., no jurisdiction exists in this Court to review such interpretation of the state law. This fact was pointed out by Justice Brandeis in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, wherein he wrote:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that *this court's power to review decisions of state courts is limited to their decisions on federal questions;* and that *the mere fact that a state court has rendered an erroneous decision on a question of state law,* or has overruled principles or doctrines established by previous decisions on which a party relied, *does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*" (Emphasis added.)

See also *Henry v. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408; *Herb v. Pitcairn* (1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *United Gas Public Service Co. v. Texas* (1938), 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702, and many others.

CONCLUSION

For the above reason the petition for certiorari should be denied.

Respectfully submitted,

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